TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]. 1913

No. [illegible] 477. 134

PIZA HERMANOS, SEN C., APPELLANT,

vs.

RICARDO A. GANDIA CALDENTEY.

IN ERROR TO THE SUPREME COURT OF PORTO RICO.

FILED DECEMBER 6, 1911.

(22,952)

(22,952)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 876.

PIZA HERMANOS, SEN C., APPELLANT,

vs.

RICARDO A. GANDIA CALDENTEY.

IN ERROR TO THE SUPREME COURT OF PORTO RICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 20, 1912.

1 ISLAND OF PORTO RICO,
Judicial District of San Juan:

In the District Court, Section 1.

Civil No. 3645.

RICARDO A. GANDÍA CALDENTEY, Plaintiff,
vs.
PIZÁ HERMANOS, S. en C., Defendants.

Collection of $15,358.23, Interest Thereon and Costs.

Complaint.

Ricardo A. Gandía Caldentey, through his attorney herein, Antonio Sarmiento, brings this his personal action against the commercial firm of Pizá Hermanos, S. en C. sues the same, and for cause of action, alleges:

First. That the petitioner herein, Ricardo A. Gandía Caldentey is of lawful age, married, of this vicinity and with legal capacity to appear for himself and to sue.

Second. That the defendant, Pizá Hermanos, is a special commercial partnership, domiciled in San Juan, with full capacity to be sued, and consisting of Antonio Pizá y Más, as the only collective and managing partner, and Francisco Pizá y Más, as special partner

Third. That from and after October fifteenth, nineteen hundred and two, when he was appointed an employee by the said defendant firm, the petitioner has been rendering his services to the said firm as such employee until the eleventh day of the current month of March, nineteen hundred and ten.

Fourth. That the compensation agreed to for the said services was a salary of one hundred and forty dollars per month, and ten
2 per cent of the net profits.

Fifth. That he has been punctually credited with his monthly compensation, and upon the taking of each and every inventory prior to January fifteenth ultimo, with ten per cent of the profits shown by such balance in a certain account which under the name of the petitioner is kept in the books of the said defendant firm, and the said account has been charged with such amounts as have been disposed of by the petitioner, which said account should now show a balance in his favor of five thousand six hundred and six dollars and ninety-two cents.

Sixth. That recently a general balance of the house was struck on the 15th of January ultimo, showing a net profit of eighteen thousand and ninety-seven dollars and eighty-one cents, of which said amount, consequently, the sum of eighteen hundred and nine dollars and seventy-eight cents accrues to this petitioner.

Seventh. That as stated above, on the 11th day of March ultimo

the petitioner ceased to be an employee of the defendant firm, a
has claimed from same a liquidation of the profits up to said da
after a true valuation of the property of the firm has been fi
made, so as to deduct definitely the ten per cent of the profits th
accrues to the petitioner.

Eighth. That for the purpose, the petitioner and the defenda
firm have agreed to accept, as struck on the 11th day of this mon
of March, the balance date January 15th ultimo, without d
crepancies other than on two points.

(*a*) The valuation of the estate named "Santa Barbara" in th
district of Dorado, which is worth, at least, eighty thousand dollar
and the defendant firm insists is worth no more than sixty thousan

(*b*) The profit in the cultivations and planting of pines and ca
on the said estate Santa Barbara, and of pines on another estate situ
ated in the barrio of Sabana Seca, municipal district of Toa Baja
which are worth twenty thousand dollars, and the defendant firm
denies that the same are worth anything at all at present.

Ninth. That by deducting from the said amount of eighty thou
sand dollars, which is the value of the estate "Santa Barbara" th
sum of twenty thousand five hundred and eighty-four dollars and
seventy-seven cents, which is the sum at which it is esti-
3 mated in the balance of January 15th, it suffers a depreciation
of fifty-four thousand four hundred and fifteen dollars and
thirty-three cents which decreases the ten per cent of the petitioner in
one-tenth of that amount, namely, in the sum of five thousand nine
hundred and forty-one dollars and fifty-three cents.

Tenth. That by placing no valuation on the profits on cultiva-
tions and plantings at Santa Barbara and the lands of Sabana Seca,
the share of the profits of the petitioner is decreased in the sum of
two thousand dollars.

Eleventh. That owing to the discrepancies hereinabove stated,
Messrs. Piza Hermanos, S. en C. refused to turn over to the peti-
tioner, not only the ten per cent on the profits under the balance of
liquidation to the 11th day of the current month of March, when he
ceased to be an employee of the house, but also the balance in favor
of the petitioner in the account on which he was credited with the
salaries and profits under prior general balances.

Twelfth. That a resumé of the different items entering into peti-
tioner's claim, is the following:

By balance in his favor in the account current of salaries and profits in general balances to January 15, ultimo	$5,606.92
By share of the profits in the general balance of January 15, 1910	1,809.78
By difference in valuation of the estate "Santa Barbara"	5,941.53
By difference in valuation of cultivations and plantings at Santa Barbara and Sabana Seca	2,000.00
Total	$15,358.23

Wherefore, the petitioner prays the Court to render judgment at the proper time against the defendant, directing that the plaintiff Ricardo A. Gandía y Caldentey do recover from Pizá Hermanos, S. en C. the sum of Fifteen Thousand Three Hundred and Fifty-eight Dollars and Twenty-three Cents, with legal interest thereon from and after the date of the filing of this complaint, and costs.

Very respectfully,

(Signed)

A. SARMIENTO,
Attorney for Plaintiff.

Filed—Secretary's Office, March 31, 1910.

A. MARIN MARIEN,
Secretary.

4

Title.

Motion on Inspection of Books.

The plaintiff in the above-entitled case, through his attorney, prays the Court that in order to provide himself with the necessary evidence in this case, the defendant herein be directed to permit the said plaintiff either by himself, or through his attorney, within the term of two days after notification hereof, to inspect the commercial books of the said defendants in the manner and for the following purposes:

1st. The book of inventories and general balances, to the end that the said defendant may furnish, authorized under the signature of the firm, or permit a notary or the secretary of the court to take, a copy of the first inventory of the firm, the general balances and distribution of profits had under date of April eleventh, nineteen hundred and four, November thirtieth, nineteen hundred and five, November fifteenth, nineteen hundred and six, and December thirty-first, nineteen hundred and seven, and January fifteenth, nineteen hundred and ten, as well as of any other that shall be found to have been taken.

2nd. The same book to the end that the said defendant may furnish, authorized under the signature of the firm, or permit a notary to take a copy of the general inventory of date of January fifteenth, nineteen hundred and ten; and

3rd. The Ledger and Day-books to the end that the said defendant may furnish, authorized under its signature, or permit a notary or the secretary of the Court to take a copy of the account under the name of the plaintiff, from October fifteen, nineteen hundred and two, beginning with the account in the Ledger, and taking from the Day-book such references thereto as may be made in the entries therein.

Very respectfully,

(Signed)

A. SARMIENTO,
Attorney for the Plaintiff.

5 Notified with copy of this motion and that the same will be argued on the fifth day of April proximo or on any other day posterior thereto that the Court may fix.

San Juan, March 31, 1910.

(Signed) JUAN HERNANDEZ LOPEZ,
Attorney for Pizá Hnos.

A. 11/910.

The motion was granted by the Court.
(See folio No. 288, Vol. 12.)

A. MARIN,
Secretary.

6 In the District Court for the Judicial District of San Juan, Porto Rico.

UNITED STATES OF AMERICA,
The President of the United States, ss:

No. 3645.

RICARDO A. GANDIA Y CALDENTEY, Plaintiff,
vs.
PIZA HERMANOS, S. EN C., Defendants.

Summons.

The People of Porto Rico to Piza Hermanos, S. en C., through the managing partner Antonio Pizá y Más:

You are hereby notified that there has been filed in the office of the Secretary of the District Court for the Judicial District of San Juan, the action of the above named plaintiff praying for judgment against the defendant and that the plaintiff Ricardo A. Gandía y Caldentey do recover from Pizá Hermanos, S. en C. the sum of Fifteen thousand three hundred and fifty-eight dollars and twenty-three cents and legal interest thereon from and after the date of the filing of the said action, and costs. The attorney for the plaintiff is A. Sarmiento.

And you are hereby notified that failing to appear and answer the said complaint within ten days after notification, if such notification be made in the district, and within twenty days, if made out of the district but in the Island of Porto Rico, and within forty days if made elsewhere, the said plaintiff may obtain judgment in his favor for the aforesaid sum of Fifteen thousand three hundred and fifty-eight dollars and twenty-three cents, legal interest thereon
7 from and after the date of the filing of said action, and costs claimed.

(Signed) PIZÁ HERMANOS, S. EN C.

Given under my hand in San Juan, Porto Rico, this 1st day of April, 1910.

A. MARIN MARIEN,
Secretary.

Certificate of Service by the Marshal.

I, Julio Maysonet, of lawful age, resident of San Juan, P. R. do swear that I have no interest in this matter and that I received the within summons at 11 o'clock a. m. on the 1st day of April, 1910, and that I served the same, personally, on the 1st day of April, 1910, at two o'clock p. m. on the above named defendant, by delivering to the said defendant and by leaving personally in his possession, at his domicile in San Juan, a copy of the said summons, and in possession of the said defendant. * * * a true and correct copy of the complaint in the action mentioned in the said summons.

Dated this 1st day of April, 1910.

——— ———, *Marshal.*
By JULIO MAYSONET,
Deputy Marshal.

Sworn to and subscribed before me by Julio Maysonet, who is known to me, this 1st day of April, 1910.

M. ESCUDERO,
Deputy Secretary.

A. 3/910.

8 In the District Court for the Judicial District of San Juan, Porto Rico, Section I.

No. 3645.

RICARDO A. GANDIA Y CALDENTEY, Plaintiff,
vs.
PIZA HERMANOS, S. en C., Defendants.

Collection of Money.

Answer.

Now comes the firm of Pizá Hermanos, defendants herein, through its attorney Juan Hernandez Lopez, and answers the complaint in the above entitled case, in the following terms:

Contraverts the said complaint, denies the facts therein stated insofar as the same may be directly or indirectly in conflict with this answer, and makes answer thereto basing same on the following facts:

1st. That under public instrument dated October 27, 1902, executed before Damian Monserrat, Notary Public, the mercantile firm of Piza Hermanos was organized, to consist of Mr. Antonio Pizá y

Más, as party of the first part, and of his brother Mr. Francisco the same sur-names, as party of the second part, under the name Pizá Hermanos, S. en C., the said Mr. Francisco having the charact of silent partner and the said Mr. Antonio of managing partner.

2nd. That in the said instrument of origination of partnershi among other clauses that are not pertinent hereto, there is the follo ing clause: "Such net profits as shall be obtained shall be distribute at the expiration of the firm in the following proportion: 78% fo the managing partner, Mr. Antonio Pizá y Más, 2% for the silen partner Mr. Francisco Pizá y Más, 10% for the employee of the hou Mr. Ricardo A. Gandía y Caldentey, and another 10% fo

9 Mr. Servando Pico y Perez, who is also an employee, wh shall, besides, enjoy and receive the salaries that have bee assigned to them as such employees, and should it be convenient t the managing partner to discharge the said employees from th house, or should the latter withdraw from the house of their own will, a proper balance will be made and, in accord therewith, such part of the profits as may accrue to them shall be delivered to them proportionately in cash, stocks, accounts and other property of the firm. As regards losses, should there be any, the same shall be suffered by the two partners only in proportion to the capital of each of them."

3rd. That the said firm of Pizá Hermanos, S. en C. was modified under instrument of November 25, 1907, executed before Damian Monserrat y Simó, Notary Public, as to Clause 5th of the instrument of organization, by extending the term for its duration to ten years, or namely, to October fifteenth, 1912, and ratifying all other clauses of the said instrument of organization of partnership.

4th. That the plaintiff herein, as an employee of the defendant mercantile firm, ceased in his employment on the 11th day of March ultimo, with all rights and benefits under clause seventh hereinabove transcribed of the instrument of organization of the said defendant company.

5th. That at the time that the said plaintiff ceased to be an employee of the said defendant mercantile firm, a general balance should have been struck to determine his share of the profits, but as a general balance of said mercantile firm had been struck under date of January 15th ultimo, both of the said parties, the plaintiff and defendant, had agreed to accept the said balance, except as to certain points in controversy stated by the plaintiff in paragraph eighth of the complaint.

6th. That the said plaintiff has a copy of the said general balance, delivered to him by the party defendant, as well as a copy of the first inventory of the firm and of general balances and distribution of profits had on August 11, 1904, November 30, 1905, November 15, 1906, December 31, 1907, and January 15, 1910, and likewise a copy of the account of the plaintiff from October 15, 1902 up to the time of his leaving the house.

10 7th. That according to the said general balance of January 15th ultimo, the assets of the firm amount- to $244,260.97 and the liabilities to $117,455.69, thus leaving a net capital of

$126,805.28, of which the sum of $107,780.65 accrues to Antonio Pizá; $3,321.04 to Francisco Pizá; $7,913.72 to Servando Pico and $7,789.87 to Ricardo A. Gandia.

8th. That the net profits under the said general balance that are already included in the above stated capitals, have been distributed subject to such results as may be shown in due time by the accounts kept in the books under the headings of "Planting of Cane for 1910," "Planting of Pines at Santa Barbara," "Administration of Santa Barbara," "General Expenses of Santa Barbara" which shall represent the expenses that have been incurred in the planting and cultivation of cane and pines actually existing in the estate "Santa Barbara" and the result of which could not be exactly known until both crops shall have been gathered and sold: in the following form: Antonio Pizá 78%, $14,116.29; Francisco Pizá 2%, $361.96; Servando Pico 10%, $1809.78 and Ricardo A. Gandía 10%, $1809.78, which make a total of $18,097.91.

9th. That Mr. Ricardo A. Gandía has been credited with, for salaries since October 15, 1902, to January 15, 1910, the sum of $12,180, as per detail set out in his respective account: and he has been credited with, for profits, since the balance of April 15, 1904, to the balance of January 15th ultimo, the sum of $13,185.75; making a total of $25,365.75 for salaries and profits. And he has disposed of the sum of $12,180, which is the amount for salaries, plus $5395.88 on account of profits. From January to March 15 of the current year he disposed of $653.17, from which deducting $280 for two months of his last salaries, it is reduced to $373.17; and, therefore, there is a balance in his favor in his account amounting to seven thousand four hundred and sixteen dollars and seventy cents.

10th. That particularly as regards the estate "Santa Barbara," it is set forth herein that the same was acquired by the defendant firm for twelve thousand dollars. This purchase was made by Mr. Ricardo A. Gardia, in his capacity of attorney in fact for Pizá Hermanos placing on the said estate, in the instrument of purchase and sale, and under his own authority, a value of eighteen thousand dollars. This was the cause for two suits against the firm by Mr. Nemesio Guardiola, one filed in the Federal Court and the other one in this District Court, and though neither of the two suits occasioned heavy expenses, yet the whole of said expenses was charged to the said estate. And it must be added that the purchase of the said estate was made under the stipulation of a rental for life in favor of the vendor in the sum of twenty dollars per month, which is paid and charged in the account of the said estate Santa Barbara.

11th. We set forth herein that it is not true that the defendant firm has not wanted to estimate the estate Santa Barbara at a nominal value of Eighty thousand dollars for sale to a third party. What the defendant company has refused to do has been to purchase the said estate for that amount to the end that the plaintiff herein may profit by receiving in cash his share of the profits on the said estate to the prejudice of all other participants therein.

12th. We further set forth herein that the defendant company

has not been willing either to make a liquidation now, for the benefit of the said plaintiff, of the accounts hereinabove mentioned, as it is impossible to know before the end of the crop what the expenses, profits or losses may be.

13th. We further set forth herein that improvements have been made on the said estate Santa Barbara since the same was acquired, which improvements have been stated and account thereof has been taken in the aforesaid inventory of January 15th ultimo.

And, lastly, the said defendant firm sets forth herein that it has been and is willing to turn over the profits of the said plaintiffs in accordance with agreement and subject to the result of the general inventory of January 15th ultimo, and other things in connection therewith.

Wherefore, I pray the Court to consider me as opposed to the said complaint on the grounds hereinabove stated, and finally, and in due course of law, to render a judgment dismissing the said
12 complaint with costs taxed against the plaintiff.

San Juan, Porto Rico, May 6, 1910.

(Signed) JUAN HERNANDEZ LOPEZ,
Attorney for the Defendant.

Filed May 6, 1910.

F. G. PEREZ ALMIROTY,
Deputy Secretary.

Filed Secretary's Office May 7, 1910.

A. MARIN,
Secretary.

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(Title.)

Opinion.

In this case the parties are agreed on several particulars and differ only on certain points which we shall endeavor to establish clearly in order to pass upon them.

1. It is agreed that since the 15th day of October, 1902, the plaintiff, Ricardo A. Gandia, was employed in the house of Piza Hermanos, S. en C. the defendant herein, and that he was, besides, attorney in fact for the said firm.

2. That the compensation agreed upon between plaintiff and defendant for the said service was One hundred and forty dollars monthly and 10% of the profits of the capital of the firm.

3. That Gandia ceased in his employment on the 11th day of March of the current year of 1910.

4. That for the purpose of liquidating the profits accruing to the plaintiff at the expiration of his contract, both of the parties litigant agreed to accept a certain general balance that at the time was being prepared of the operations of the house, which was to bear date of January 15 of the current year, without any points of discrepancy other than the valuation of the estate Santa Barbara, which is a part of the capital of the firm, and the valuation of profits on cultivations and plantings on the said estate and on the estate of Sabana Seca.

5. That the balance of January 15th ultimo shows a net profit of $18,097.81, of which the sum of $1809.79 accrued to the plaintiff:

6th. That the account current of the plaintiff with the house of the defendant, upon termination of his services, showed a balance in favor of the plaintiff of the sum of $5,606.92, to which, adding the sum of $1809.78, of the balance of January 15th ultimo, makes a total of $7,415.70.

The differences arising between the litigants and which are
14 the object of this suit and of this decision, are the following:

1st. In which form is the plaintiff to receive the 10% of the profits; the plaintiff maintaining that it should be in cash and the defendant alleging that it should be proportionately in cash, stocks, accounts, and other property of the firm, pursuant to a certain clause in the instrument of articles of partnership of Pizá Hermanos, S. en C.

2nd. The valuation of the estate Santa Barbara which is estimated by the plaintiff at $80,000 and by the defendant at $60,000.

3rd. The valuation of the profits on cultivations and plantings at Santa Barbara and Salana Seca, estimated by the plaintiff at $20,000 and which, according to the defendant, are of no value at all on the date of the claim.

In solving the first point of divergence between the parties in this litigation, we shall set forth that from the evidence introduced it has not been shown that Mr. Gandia was an industrial partner of the firm of Pizá Hermanos, S. en C., but on the contrary that he was no such partner, and merely an employee of the house and general attorney in fact for the same, with a fixed salary of $140 monthly and 10% of the profits thereof.

In the instrument of organization of the company, introduced in evidence in this case, Mr. Gandia does not intervene as a partner; he entered into no contract for bringing his industry into the said firm, according to the said instrument, but on the contrary, it appears from the instrument itself that he had no capacity other than an employee and attorney in fact.

Furthermore paragraphs 4th and 5th of the answer state as follows:

4th. That the plaintiff herein as an employee of the defendant mercantile firm, etc. etc. * * *

5th. That at the time that the said plaintiff ceased to be an employee of the said defendant mercantile firm, etc etc. * * *

It appears herefrom that the defendants themselves have acknowledged under their allegation and under the instrument of partnership that the said Mr. Gandia was no such partner but merely
15 an employee and an attorney in fact. Moreover, the testimony as to this point leaves no doubt whatever as to the capacity of Mr. Gandia in the said firm.

From his testimony, and from the testimony of Mr. Pico, another employee and attorney in fact of the said house, it appears that no one of the two was anything else than employee and attorney in fact, and no partner.

Having established this point, let us see the form for liquidating

the 10% of the profits accruing to Mr. Gandía on his verbal contract with Mr. Pizá, the only managing partner of the defendant firm.

From the testimony taken we come to the conclusion that the only agreement existing between the plaintiff and Mr. Antonio Pizá, was that he was to receive for his services to the house $140 monthly and, besides, 10% of the profits, and that no proposition was made to Mr. Gandía and no agreement entered into with him that the profits were to be distributed in the manner alleged by the defendant which is the same as set out in one of the clauses of the instrument of partnership of Pizá Hermanos, S. en C.

The terms of the said instrument, as to this point, cannot prejudice Mr. Gandía because he did not accept the same, nor did he agree thereto in any manner with the defendant firm, and we must abide by the verbal contract between the parties which did not determine the manner for the payment of that 10% in the way in which it is stated in the instrument of partnership. Further corroboration that the contract for services between Mr. Gandía and the defendant firm was as alleged by the plaintiff, is the fact that in such balances as were struck by the defendant firm in the years 1904, 1905 and 1906, subsequent to the instrument of partnership that contains the aforesaid clause, the account of Mr. Gandía has been credited with his 10% of the share of the profits, and that during that time he has disposed, not only of all his salaries but also of the sum of $5,000 accrued on the said 10%. It is true that in the balance for 1907 and 1910 the defendant firm follows a different system, but it is
16 shown by the new sytem that the share of the profits accruing to the said plaintiff in the said balance was deserving of the same consideration.

In prior balances the name of the plaintiff appeared among the creditors of Pizá Hermanos, but on making a distribution of the capital of the firm in 1907 and in 1910, there was apportioned to the plaintiff in the year 1907 the sum of $9,450.33, and in 1910 the sum of $7,789.87, the same being, not the sums of unliquidated profits accruing to the plaintiff up to the said years, but balances in the account current of Gandía up to the date of each of said balances, and on which said account current his share of the profits under each balance was credited to him as cash belonging to the said plaintiff.

The mere fact that Mr. Gandía had knowledge of the instrument of partnership of Pizá Hermanos three or four months after it was executed and that he made no protest on account thereof, has a logical and reasonable explanation.

On the one hand Mr. Pizá was not in Porto Rico, and on the other, a balance of the house was struck immediately upon his return, and as the ten per cent of the profits was credited to Mr. Gandía in cash in his account current, and not as stated in the clause of the instrument of partnership, proportionately in all property of the firm, hence that he had no objection to make to that clause, inasmuch as his contract with the defendant firm had been complied with.

As a résumé of the above we come to the conclusion that Mr. Gandía is entitled to his profits, not in the form alleged by the defendant to be paid proportionately in all kinds of property, but to be credited and paid in cash upon the striking of balances.

Having decided the first point in controversy, let us take up the second point.

The party defendant acknowledges under paragraph ninth of its answer that the account current of the said plaintiff shows a balance in favor of the latter in the sum of seven thousand four hun-
17 dred and sixteen dollars and seventy cents.

The party defendant further acknowledges under paragraph fifth of its answer, that for the purpose of the balance of liquidation brought about by the expiration of the commission of the plaintiff, the value of the estate Santa Barbara was fixed at $60,000 and inasmuch as in the inventory and balance of January 15th ultimo, accepted by both parties in everything except the valuation of Santa Barbara and the valuation of profits on cultivations and plantings, the said estate appears with a value of $20,584.67, it is evident that the defendant admits, of course, that the estate Santa Barbara should appear in the balance of liquidation with an increase in the value of the difference between its value, according to the defendant, of $60,000, and the value at which it is placed in the balance, namely, $20,584.67; that is to say, $39,415.33, ten per cent of which is $3,941.53 that accrues to the plaintiff.

Therefore the defendant has admitted that there is due to the plaintiff:

By balance of account current	$7,416.70
By difference in the value of Santa Barbara	3,941.53
Total	$11,358.23

The discussion on this point is therefore as to whether or not the value of Santa Barbara is $60,000, as averred by defendants, or $80,000 as maintained by the plaintiff; and as to whether or not the profits and plantings and cultivations of Santa Barbara and Sabana Seca were worth $20,000 at the time of the expiration of the commission of the plaintiff, or whether they may not be liquidated up to the date of the complaint.

In the inventory of 1902, of the special partnership of Pizá Hermanos, the estate Santa Barbara does not appear as a part of the capital of the firm as the acquisition thereof was subsequent thereto and one of the many transactions engaged in by the said defendant firm.

It is so verified by Mr. Servando Pico, a witness for the defendant, on stating that the said estate appears in the accounts of the house the same as any other account; that it was acquired with the
18 capital of the firm and in due course of business of the said firm in November, 1902.

That the estate Santa Barbara is worth more than $60,000 on the date that the plaintiff ceased to be an employee of the defendant firm is shown clearly by the evidence in the trial.

In the first place, it is stated in the balance of December 31, 1907, that the net capital of the firm on that date, of $149,623.67 should be really estimated $49,967.20, more, because the estate Santa Barbara appears with a value of $20,032.80 whereas the value thereof

on the said date, December 30, 1907, was $70,000 by virtue of pla
ings existing thereon.

Regarding this inventory we must point out that though it
pears from the copies furnished to the plaintiff by the defendant t
in the entry to which we refer it was stated that the said valuat
was placed "for amount for the credit of the house," yet, it has be
shown sufficiently to us that when the balance was written the s
words "for amount for the credit of the house" did not exist, and
a preponderance of evidence it has been shown to us also that wh
Mr. Gandia ceased to be an employee of the defendant firm, on t
11th day of March of this year, the aforesaid words had not be
written and that they were written subsequently.

In view of this conclusion we understand that the value of $70,0
was placed on that estate, not for amount for credit of the hou
but merely because it was the value at which it was estimated by t
defendant firm.

But even supposing that it was placed for amount for the credit
the house, we do not believe that the firm defendant would have
appear on the books with a value greater than the true value, to th
prejudice of its clients.

After this it must be admitted that the estate Santa Barbara
worth at least $70,000; first, because it has accepted a value of $80
000 in the answer to the complaint; and, second, because it place
thereon a value of $70,000 in its own accounts.

But from the evidence introduced by the plaintiff we un
19 derstand that it is worth even more than such amounts, an
that it is worth more than $80,000 at which it is estimated by
the plaintiff.

The testimony of the witnesses introduced on this point, persons
who are honorable and competent, leaves us in no doubt as to this
averment: that the estate "Santa Barbara" on the 11th of March
of this year was work $80,0000, and even more.

Therefore, making with this amount of $80,000 the same opera-
tion as we made before with the $60,000 at which it is estimated by
the defendant, we shall have:

Balance of Account Current of Mr. Gandía.....	$7,416.70
Difference between $80,000 and $20,584.67 stated for Santa Barbara, equals $59,415.33, ten per cent of which is	5,941.53
Total	$13,358.23

When Mr. Gandía, on the 11th of March ultimo, ceased to be an
employee of the defendant firm, the latter had under exploitation
certain plantations of canes and pines at Santa Barbara and of pines
only at Sabana Seca, and the discussion is as to whether such plan-
tations should be appraised and liquidated, up to that date, or
whether the same should stand pending the gathering of the crops
and then distribute such profits as may accrue.

As Mr. Gandía was nothing else than an employee and attorney in
fact of the firm of Pizá Hermanos, S. en C. his compensation should

have ceased, and did cease, in fact, upon termination of the commission that he was discharging and, therefore, plantings and cultivations should have been liquidated then so as to know the amount of his ten per cent thereon; and we cannot explain to ourselves how it is that the defendant from being willing to liquidate on March 11 all the business of the house, and even the very estate "Santa Barbara" wherein there was only a difference in value, the same thing should not have been done with the plantations which undoubtedly had some value on that date.

The plaintiff is not bound to suffer any loss on the plantations subsequent to the date of his ceasing as an employee, if such losses did occur; nor is he entitled, either, to a ten per cent on profits *ulterior* to the date of his ceasing and which may be secured
20 by expenses and care of the defendant firm. Therefore the said plantations should be liquidated on the date that he finished his commission.

It is true that in the entry of January 15, 1902, made in the account current of Mr. Ricardo A. Gandía with the defendant firm, on his being credited with the sum of $1809.78 accruing to him for his ten per cent. of the profits, it is stated that it has been done subject to such results as may be shown in due time by the accounts kept in the books of the house under the headings of "Planting of Cane for 1910," "Planting of Pines at Santa Barbara," "Administration of Santa Barbara" and General Expenses on that Estate, which represent the expenses that have been incurred in the planting and cultivation of canes and pines existing thereon and the result of which could not be exactly known until both crops shall have been gathered and sold. But the said entry in the books was not made at the time that Mr. Gandía was serving in the house but subsequent to his leaving; for although the balance was as of date of January 15th, yet, when he left the firm on March 11th, the general balance was not finished, nor a clean copy made on the books of the results thereunder.

This is also confirmed by the fact that when Mr. Pizá was notified on March 12th ultimo to deliver to Mr. Gandía the balance and liquidation of profits, Mr. Pizá answered that it was not finished as yet and had not been clean copied.

The said entry that appears in the said balance does not appear in any of the balances prior thereto. On such balances the profits of all kinds were distributed without making any entry similar to that, and it would not be difficult to conjecture that on stating it in that way, after Mr. Gandía had left the house as an employee thereof, it was done in consideration of the differences arising between both as to whether or not the same should be appraised for liquidation.

We therefore hold that the plantations of canes and pines should have been appraised and valued on March 11th ultimo so as to adjudicate his ten per cent to the employee who was ceasing
21 in the house and who was entitled to it.

Pursuant to the evidence introduced there was at Santa Barbara, on the 11th day of March, 115 cuerdas of "plantilla" cane

and about 20 cuerdas of ratoon cane, plus 80 cuerdas of pines, an 30 cuerdas also of pines at Sabana Seca.

The expert testimony given has shown that the net production o the said canes on March 11th should be $10,530.00, and of the 11 cuerdas of pines, $44,000.00, which sum of $50,530 represents valuation much superior to $20,000 at which it was estimated b the plaintiff.

Consequently as he limited his petition on $20,000, ten per cent of this amount is $2,000 which must be added to the sum of $13, 358.23 hereinabove stated by us, and which makes a total value o $15,358.23, which is the same amount claimed in the complaint and which the defendant firm is owing to Mr. Ricardo A. Gandía.

As regards the value of the plantations of canes and pines, the defendant introduced in evidence the testimony of Mr. Servando Pico, general attorney in fact for the defendant firm, so as to show that such plantations produced a loss; but it was not determined specifically what said loss consisted of, nor which were the exact amounts thereof, whereas the said defendant had in its possession the books in which the said accounts were necessarily kept, and which is better evidence than testimony in the form given by Mr. Pico.

As the aforesaid amount should have been paid on the 11th day of March, 1910, and was not so paid, the said defendant has incurred laches from the time that it was judicially claimed under the complaint, and from the date of the said complaint, which is March 31 of this year, it is owing to the plaintiff legal interest thereon at the rate of six per cent per annum. Judgment will be rendered in accordance with this opinion, with costs, in favor of the plaintiff.

(Signed) PEDRO DE ALDREY,
District Judge, Section 1.

22 (Title.)

Judgment.

This case having been called for trial on the sixth day of September, and the parties thereto having appeared through their attorneys and the plaintiff also by himself personally, after announcing that they were — for trial, the attorneys read their allegations and introduced their evidence and the case was submitted subject to the filing of briefs.

And the Court taking into consideration the allegations, the evidence, and the briefs of the attorneys for the parties and on the grounds of the opinion drafted in this case, holds that the facts and the law are in favor of the party plaintiff and against the party defendant, and therefore renders judgment declaring that the mercantile firm of Piza Hermanos, S. en C. is indebted to the plaintiff, Mr. Ricardo A. Gandía Calderón in the sum of $15,358.23 and legal interest thereon at the rate of six per cent. per annum, from the 31st day of March of the present year, which was the date of

the filing of the complaint, until payment *therefor* shall be made, and with the costs of this action.

The Secretary shall enter this judgment and issue an order of execution for the enforcement thereof.

Given in open court this tenth day of November, 1910.

(Signed) PEDRO DE ALDREY,
District Judge, Section 1.

I certify.

A. MARIN MARIEN, *Secretary.*

23 In the District Court for the Judicial District of San Juan, P. R., Section I.

Civil Case No. 3645.

RICARDO A. GANDÍA CALDENTEY, Plaintiff,
vs.
PIZÁ HERMANOS, S. EN C., Defendants.

Collection of Money.

Statement of the Case.

This is an aciton brought by Ricardo A. Gandía Caldentey, as plaintiff, against Piza Hermanos, S. en C., for the collection of money.

The hearing of the case having been set by the Court for the 6th day of September, 1910, both parties, the plaintiff, represented by Antonio Sarmiento, his attorney, and by himself personally, and the defendant by their attorney, Juan Hernandez Lopez, appeared before the Court and announced that they were ready for the hearing.

The Court ordered the parties to make their allegations, which they did by the reading of the complaint and answer, respectively. Whereupon the introduction of evidence was also ordered, first by the party plaintiff.

The plaintiff began the introduction of his evidence by calling his first witness, RICARDO A. GANDÍA, who, under oath, testified:

That his name is Ricardo A. Gandía, forty-five years of age, by profession a merchant, and heretofore business clerk; that he has rendered his services as a merchant in the house of Pizá Hermanos, lately as general attorney-in-fact for the same; that he had agreed with Mr. Pizá that his monthly compensation was to be one hundred and forty dollars and in addition thereto ten per cent. of the profits as shown by each balance that was to be made annually, as provided by the Code of Commerce, or, at least, as near that
24 date as might be possible, which said profits were to be credited, as they were credited, to his personal account, which was the only account that he had with the house.

That together with the said profits they also credited him with his salary, and such credit—all such profits and salary—were fully at his disposal; that the proof of it was that he has been freely disposing of same, and as it was very well said just now by Mr. Hernandez Lopez, not only did he dispose of the part appertaining to his salary, but also of such a part of the profits as he required for his living; that the agreement with Mr. Pizá was ten per cent. of the liquidated profits that were credited to him in his personal account, the only account he had; that there was no account of profits to be liquidated.

The same witness, Mr. Gandía, being cross-examined by the defendant, replied: That he entered the old house of Pizá Hermanos in July, 1893, so that it is about seventeen years that he had been an employee of the house; that he entered the old house as a clerk; that he discharged the duties of correspondent and very soon thereafter of book-keeper, and afterwards, both, correspondent and book-keeper; that on the organization of the present new firm of Pizá Hermanos he was book-keeper; that when this firm was organized he was attorney-in-fact for the former; he was book-keeper and at the same time attorney-in-fact for the former at the time of the death of Don Juan. Don Juan appointed him attorney-in-fact some time before he died, and he remained at the head of the house until the return of Don Antonio Pizá, under power of attorney granted him by the new firm; that in the new firm and with the new firm he had entered into a verbal agreement; that such agreement was not set out anywhere nor was there any written stipulation; that he came to know the new instrument of organization of the new firm many months after the same was executed; that, if permitted by the attorney, he would give the history as to why he came to know of it later on. This instrument is dated October 27, 1902. Mr. Antonio Pizá without consulting, as he was not obliged to do so, those who were to be its attorneys or who were then its attorneys, executed that instrument; that instrument was executed October 27. On the following day, October 28, he sailed for the United States; from the United States he went to Europe; his wife was taken ill and he returned to Porto Rico, November 28, 1903, thirteen months after the execution of the instrument. The said instrument remained in possession of the Notary and came to the house, came to my hands, after the same had been recorded in the Commercial Registry, so that, as he figures, two or three months elapsed from the date of the instrument to the time when he saw the same; that he read it and was surprised at Clause 5 thereof, but that inasmuch as that was not the agreement that he had made with Mr. Antonio Pizá and as the witness had had no intervention whatever in the instrument, he always thought that such instrument was not at all binding upon him, and he always expected to be able to call the attention of his chief to that point; but Mr. Antonio Pizá took thirteen months to return to Porto Rico; immediately upon his return there was talk about making a general balance; it did not seem to him opportune, before a balance, to speak about that, and he waited for such balance and for the apportion-

ment of the profits to see the way in which the same were distributed, and if it was not in the manner agreed upon then file his protest, and if it was done as agreed to then, of course, say nothing.

Pizá came, the balance was made, and the profits were apportioned in the same manner in which we had agreed, that is to say, crediting the said profits to the account of the declarant. And he had no reason to take seriously an instrument in which he had had no intervention, because the terms of the contract between Pizá and himself had been lived up to; that he knew of the instrument, Pizá returned, and he did not consider it advisable to tell him that he did not approve of Clause 5 of said instrument; that he kept on working.

Cross-questioned by defendant as to when Santa Barbara was acquired, the witness answered: a short time after the organization of the last house.

26 The plaintiff objected to this question on the ground that it had not been a matter of direct examination by the plaintiff. Mr. Gandía will testify three times and that point will be brought out in direct examination. It is my purpose to introduce the proper evidence, separately, on each of the points in controversy.

DEFENDANT: Then I reserve the right to cross-examine at the end.

The plaintiff introduces in evidence the account current of Ricardo A. Gandia with Pizá Hermanos, S. en C., which is admitted without objection and is marked "Document No. 1."

The Attorney for the plaintiff says: "I wish to state that the several amounts that have been taken by Mr. Ricardo Gandia for his personal use appear on the debit side, and the one hundred and forty dollars of his monthly salary on the credit side. There is an entry reading as follows: April 30, 1904. Percentage of profits on $8,967.96, $896.79. It is in the same condition *in* November 30, 1905. Ten per cent on $35,502.45, $3,540.25. In the same manner *in* November 30, 1906. His share of the profits in the balance, 10% on $34,950.00. Credit, $3,495.00. In 1907, December 31, 1907, by 10% on $34,439.30, his share of the profits in balance of this date $3,443.93. And, lastly, January 15, 1910, by 10%, his share of the profits shown up to this day by this account current, on $18,097.85, reserving whatever may result at the proper time in the books of this house under the headings of "Cane plantations for 1910," "Pine plantation at Santa Barbara," "Administration of Santa Barbara," "General Expenses at Santa Barbara," representing the expenses made for cultivation and planting of cane and pines now existing in the estate of Santa Barbara, the result of which will not be known exactly until both crops have been gathered and sold, $1,809.78." I propose to introduce evidence as to this entry. The Honorable Court asks the plaintiff whether such are the particulars of that document in which he is interested, and he answers: Yes sir.

DEFENDANT: I accept the document but in full.

The COURT: The stenographer will make entry that the party de-

fendant desires that the Court shall examine this Account Current in full.

27 PLAINTIFF: I believe that when it comes to the introduction of evidence for the defendant, this account current may be considered as reproduced in its entirety.

The COURT: You were introducing the document in part and he says in full.

The said document in the pertinent part thereof, is as follows: Documentary evidence for the plaintiff, admitted.

Document No. 1.

Account Curren of Mr. Ricardo A. Gandía with Pizá Hermanos, S. en C., Beginning October, 1902, and Ending March 15, 1910.

Mr. Ricardo A. Gandía in Account Current with Pizá Hermanos, S. en C.

			Debit.	Credit.
1902.				
Oct.	10.	3 neck-ties	.79	
"	29.	Cash	34.00	
Oct.	31.	By half month's salary, etc. etc.		
1903.				
Jan.	2.	9¾ milk. Cash etc. etc. etc.		
Feb'y.	31.	His salary for January	.....	140.00
Feb'y	—.	Etc. etc. etc.		
1904.				
Jan.	2.	Cash, etc. etc. etc.		
"	30.	By his salary	.....	140.00
Apr.	30.	By 10% appertaining to him on $8,967.96 profits, etc. etc. etc.	.....	896.79
1905.				
Jan.	7.	Cash, etc. etc.		
"	31.	By his salary, current month. etc. etc. etc.		
Nov.	30.	Appertaining to him for profits, 10% on $35,502.45	.....	3,540.25
		By balance	.....	$4,069.17
1906.				
Jan.	3.	To 9¾ milk in December, etc. etc. etc.	4.65	
"	31.	His salary, etc. etc. etc.		
Nov.	15.	Appertaining to him profits in balance, 10% on $34,950.03	.....	3,495.00
			7,453.10	
			9,944.17	9,944.17
Nov.	15.	By balance as per inventory		7,453.10

1907.				
		Mdse. salaries, etc. etc. etc.		
Dec.	31.	By 10% on $34,439.30 appertaining to him for profits in the balance of this date	.....	3,443.93
Dec.	31.	By balance, as per inventory	.....	$9,450.33
1908.				
		Mdse. salaries, etc. etc. etc.		
28				
1909.				
		Mdse. cash, etc. etc. salaries.		
1910.				
Jan.	—.	Mdse. cash, etc.		
Jan.	15.	By half month's salary, current month	.....	70.00
"	15.	By 10% of the profits shown in this account up to this date, on $18,097.85, reserving whatever may result at the proper time in the books of this house under the headings of Cane Plantations for 1910, Pine Plantations at Santa Barbara, General Expenses at Santa Barbara, representing the expenses incurred for cultivation and planting of cane and pines now existing on the estate Santa Barbara, and the result of which will not be known exactly until both crops shall have been gathered and sold	.....	$1,809.70
		Balance.....	$7,789.87	
			15,190.11	15,190.11
1910.				
Jan.	15.	By balance as per inventory.		
		Mdse. cash, etc. etc. etc.		
Jan.	31.	For 15 days' salary, etc.		
M'ch	15.	Half month's salary.		
		Balance.....	7,416.70	
			8,069.67	$8,069.87
March	15.	By balance in his favor this day	$7,416.70	

San Juan, March 15, 1910.

Pizá Hermanos, S. en C.

Mr. Ricardo A. Gandía has been credited for salaries and profits from October 15, 1902, to January 15, 1910, as detailed		12,180.00
Profits, as per balances		13,185.75
Total		25,365.75
During that period of time he has disposed of		17,575.88
He has disposed of the sum of $12,180 for salary and of $5,395.88 out of $13,185.75 of profits.		7,789.87
From January to March 15, 1910, he disposed of	$653.17	
Less two months' salary	280.00	373.17
		7,416.70

The plaintiff introduces the general inventory of Pizá Hermanos, S. en C. taken April 11, 1904.

It is admitted by the Court without objection by the opposing party, and is marked with No. 2.

PLAINTIFF: It is important for me to state that in this document, in the liabilities of this inventory, Mr. Ricardo Gandía figures as a creditor in account current; Mr. R. A. Gandía with $918.74, and the distribution of profits is as follows: Total assets 121,345.68,
29 Total liabilities 50,580.80. Net capital 69,764.88. Which appertains to Antonio Pizá. Capital account, capital as per previous inventory, 60,000. Increase by profits 8,647.27. 68,647.27. To Francisco Pizá, Capital account, capital as per previous inventory, 1,000.00. Increase by profits, 117.61.—1117.61. Total—69,764.88.

The COURT: Is the other party agreed to these particulars or do they wish to add some others?

DEFENDANT: In view of the turn that this evidence is taking and which I am perfectly realizing, I do not accept such incomplete documentation: I accept the whole of it.

The COURT: Then the plaintiff will specify no particulars; introduce it in full.

Document No. 2, for the Plaintiff.

Copy of the General Inventory of the Real and Personal Property and Outstanding Credits and Obligations Belonging to the Firm Doing Business in This Market under the Name of Pizá Hermanos, Sociedad en Comandita (Special Partnership) Taken April 11, 1904.

Assets.

Merchandise:		
Linen goods, cretons, prugastel, drills, batists, pique, percales, sateen, zephyrs, sundries, crude drills, shoes, sandals, sundries, embroideries, laces, ribbons, undershirts, socks, shirts, hats, pants, umbrellas, sundries, as detailed	$36,536.99	
Less deduction on appraisement	1,000.00	
		35,536.99
Store "La Bomba."		
Stock on hand this day of merchandise, fixtures and accounts, as per inventory		5,648.24
Store "La Americana."		
Stock on hand this day of merchandise, fixtures and accounts, as per inventory		4,474.27
Cash Account.		
Cash on hand		600.98
American-Colonial Bank, on deposit		869.75
Green Hides Account, as detailed		5,415.99
Dry Hides Account, as detailed		1,642.46
Estate Santa Barbara.		
This estate consisting of 640 cuerdas of land and another parcel of 50 cuerdas, both in the District of Dorado, purchase price		12,000.00
Cane to be ground—22,000 quintals of cane which are approximately ready for grinding, as estimated, in the said Estate Santa Barbara representing at 5% 1100 quintals of sugar at 3.20		3,520.00
Planting of cane—Cost of planting 100 cuerdas cane and cultivating 45 cuerdas of ratoon cane on the estate Santa Barbara, and materials for the said plantation		5,668.92
Manufacturing Account—Machinery, apparatus and stock of undershirts, etc.		4,611.98

Cattle at Santa Barbara—42 head of cattle with 293 x 25 lbs.		586.00
Shares of stock of the Spanish Bank—83 shares of this bank, representing a cost of		2,967.79
Fixtures as per detail		996.00
Arturo E. Diaz & Company, Special Capital Account: Special capital in this firm in Arecibo		3,000.00
Bills Receivable, (as detailed)		2,000.00
Debtors under mortgages (as detailed)		3,670.44
Debtors in Account Current, (as detailed)		31,806.31
Total assets		$121,345.68

Liabilities.

Creditors in Account Current (as detailed) (among them Ricardo A. Gandía $918.74)		51,580.80
Total assets		121,345.68
Total liabilities		51,580.80
Net capital		69,764.88
which appertains to		
Antonio Pizá, Capital Account—		
Capital as per previous inventory	60,000.00	
Increase by profits	8,647.27	
		68,647.27
Francisco Pizá, Capital Account—		
Capital as per previous inventory	1,000.00	
Increase by profits	117.61	
		1,117.61
		$69,764.88

San Juan, P. R., April 11, 1904.

Pizá Hermanos, S. en C.

This copy of the inventory consists of 25 folios.

The plaintiff introduces the inventory of the house, of November , 1905, which is admitted by the Court, without objection by the fendant and is marked "Document No. 3."

Document No. 3, for the Plaintiff.

Copy of the General Inventory of the Real and Personal Property and Outstanding Credits and Obligations Belonging to the Firm Doing Business in This Market under the Name of Pizá Hermanos S. en C., taken November 30, 1905.

Assets.

Merchandise, drills, sateens, parcales, ginghams, mallorca, ditto La Bruja, zephyrs, cretons, batists, linens,, cashmeres, Irish linen, handkerchiefs, domestic, prugastels, alpilleras, batists, cotton sheeting, embroideries, laces, towels, blankets, corsets, shawls, shirts, etc. etc. as detailed	58,628.96
Manufactured goods, as detailed, in the shop, etc. etc.	8,256.18
Cash Account—Cash on hand	1,100.67
American-Colonial Bank—On deposit in this bank	2,923.57
Bank of Porto Rico—On deposit in this bank	672.37
"La Bomba"—Stock of shoes, fixtures, etc.	8,064.30
Green Hides Account	618.17
Dry Hides Account—as detailed	431.41
Estate Santa Barbara—	
This estate consisting of 600 cuerdas of land, and another parcel of 30 cuerdas, both in the district of Dorado	13,002.70
Cattle at Santa Barbara, as detailed	925.55
Cattle for slaughtering, as detailed	1,485.50
Planting of cane for 1906—	
Invested in the plantation and cultivation of cane for grinding during the season 1906	14,572.56
Planting of Cane for 1907—	
Initial expenses in preparing land for 1907	32.34
Agricultural implements, as detailed	3,323.37
17½ yoke of oxen	1,742.99
1 bay horse	51.00
	$115,831.87
Poultry Industry—Incubators, etc. at Santa Barbara	305.49
Shares of the Spanish Bank—83 shares in this bank, now the Bank of Porto Rico	2,967.79
Fixtures, as per detail	918.90
Arturo E. Diaz, Special Account—	
Special capital in this firm in Arecibo	3,000.00
Bills Receivable, as detailed	1,500.00
La Americana—	
Outstanding accounts thought to be easily collectible	150.00

Remittances for our account—		
Gold dust in New York with Muller, Schall & Co.		644.69
		12,318.74
Debtors.		
Under mortgages, as detailed	2,336.23	
In account Current, as detailed	76,502.09	
		78,838.32
Total Assets		$204,157.06
Liabilities.		
Creditors (as detailed, among them Ricardo A. Gandía, on page 382 for $1,069.17)		
Total liabilities		113,283.26
Total assets		204,157.06
Total liabilities		113,283.26
Net capital		90,863.80
which appertains to		
Antonio Pizá, Capital Account—		
Capital as per previous balance	68,647.27	
Profits in this balance less his private account 27,868.26 / 7,213.03	20,655.23	
		89,302.50
Francisco Pizá, Capital Account—		
Capital as per previous balance	1,117.61	
Profits in this balance	453.69	
		1,571.30
		90,873.80
32 Distribution of profits under balance of November 30, 1905.		
Net profits		35,402.45
which is apportioned as follows:		
Ricardo A. Gandía, 10% on 35,402.45	3,540.25	
Servando Pico, 10% on 35,402.45	3,540.25	
Antonio Pizá, his proportionate share on 28,321.95 for his capital of 6,847.27	27,868.26	
Francisco Piza, his proportionate share on 28,321.95 for his capital of 1,117.61	453.69	
		$35,402.45

San Juan, Porto Rico, November 30, 1905.

This copy of inventory consists of twenty-seven folios.

PIZA HERMANOS, S. EN C.

The plaintiff further introduces the inventory of the said house on November 30, 1906. It is also admitted by the Court, without objection by the defendant, and is marked No. 4.

Document No. 4, for the Plaintiff.

Copy of General Inventory of the Real and Personal Property and Outstanding Credits and Obligations Belonging to the Firm Doing Business in this market under the name of Pizá Hermanos, S. en C. Taken November 15, 1906.

Assets.

Merchandise.—Drills, percales, white batistes, Irish linen, linens, merino, zephyrs, muslin, pique, cotton sheeting, cantes, crude drills, sundries, sateens, alpacas, linen goods, laces, embroideries, blankets, undershirts, ribbons, handkedchiefs, stockings, socks, sundries, towels, umbrellas, sandals, and shoes, as detailed		63,973.50
Manufacturing Account—material as detailed	3,360.38	
Manufactured Goods—as detailed		3,102.19
Cash—Cash on hand		1,128.53
American Colonial Bank — on deposit in this bank		4,213.99
Bank of Porto Rico—in this bank		793.42
Shares of the Bank of Porto Rico, 83 shares of the old Spanish Bank		2,967.79
Green Hides Account, as detailed		3,141.61
Dry Hides Account, as detailed		1,359.50
Bills Receivable—as specified		1,100.00
Estate Santa Barbara—		
This estate, consisting of 640 cuerdas of land, and another parcel of 50 cuerdas, both in the District of Dorado	16,863.46	
Agricultural Implements, as detailed	8,136.46	
Cattle at Santa Barbara, as detailed	1,210.88	
Planting of Cane for 1907: funds invested in planting cane for 1907	13,312.40	
		39,523.20

33

Estate Union.

Cattle thereon	226.00
Slaughter account, as detailed	218.00
Stall in Santurce	128.00
Slaughter in Bayamon, as detailed	847.32

Special Capital Account with Arturo E. Diaz—Special Capital in this firm		3,000.00
Fixture Account, as detailed		918.90
La Bomba—Accounts pending of collection estimated at		150.00
Debtors as detailed		126,792.05
		125,217.42
Total assets		$252,009.47

Liabilities.

Creditors, as per detail (among them Ricardo A. Gandía for $7,453.10),		
Total liabilities		139,283.87
Net capital		112,725.60
which appertains to		
Antonio Pizá, Capital as per previous balance	89,302.50	
Profits accrued to him in this general balance... 27,261.03		
Less his private account.. 6,108.23	21,152.80	
		110,455.30
Francisco Pizá, capital in previous balance	1,571.30	
Profits in this	699.00	
		2,270.30
		112,725.60

Apportionment of profits:

Net profits accruing to—		
Ricardo A. Gandía, 10% on 34,950.03	3,495.00	
Servando Pico, 10% on 34,950.03..	3,495.00	
Antonio Pizá, 78% on 34,950.03..	27,261.03	
Francisco Pizá, 2% on 34,950.03..	699.00	
		34,950.03

San Juan, P. R. November 15, 1906.
This inventory account consists of twenty-five folios.

PIZA HERMANOS, S. EN C.

PLAINTIFF: The balance of 1907, which is also introduced on the aforesaid suggestion of the Court, without indication as to the contents thereof, but calling attention to the fact that it will be the object for the introduction of special evidence in regard thereto; and it will be the object of such evidence because I do not accept the conditions

in which the addition figures in this balance of 1907 in the manner in which it is drafted.

The COURT: Is it a document furnished by the other side?

—. Yes sir.

It is admitted and marked No. 5, without objection.

34 *Document No. 5, for the Plaintiff.*

Copy of General Inventory of the Real and Personal Property and Outstanding Credits and Obligations Belonging to the Firm Doing Business in This Market under the Name of Pizá Hermanos, Sociedad en Comandita (Special Partnership). Taken December 31, 1907.

Assets.

Merchandise.—Drills, zephyrs, cotton sheeting, percales, domestic canvas, gloves, pique, linen goods, sedaline, fancy goods, sateens, Irish linen, fans, linen cloth, nansook, cashmere, alpaca, crea, arpilleras, comforters, shirts, embroideries, undershirts, handkerchiefs, laces, belts, blankets, towels, hats, shawls, neck-ties, umbrellas, corsets, buttons, soaps, shoes, stockings, socks, ribbons, sundries, as detailed.		123,879.58
Manufactured Goods—Stock in warehouse as detailed.		7,825.45
Manufactured Goods (additional). The undershirt factory, etc.		10.00
Green Hides Account (as detailed)		3,218.78
Dry Hides Account (as detailed)		2,416.93
Cattle at Santa Barbara (as detailed)		2,632.79
Cash Account—Cash on hand		435.06
American Colonial Bank—On deposit in this bank		852.30
Bank of Porto Rico—In this bank		437.30
Muller, Schall & Co.—in their possession		680.51

Estate Santa Barbara.

This estate consisting of 640 cuerdas of land, another parcel of 50 cuerdas, and still another of 10 cuerdas, all in the district of Dorado, devoted to cane planting and pasture for cattle raising, the cost thereof		20,032.80

Estate at Sabana Seca.

In the exploitation of this property belonging to Mr. Antonio Pizá, personally,		
Oxen, cart loads of fire-wood, burning lime, etc. etc. as detailed	1,429.92	
Loss through drought 123.16 x 25 lbs.	369.48	
		1,060.44

Planting of Cane for 1908.

Funds invested in the planting of cane for the crop of 1908 at Santa Barbara	13,103.19

Planting of Pines.		
Funds invested in planting 10 cuerdas of pines in the Sabana Seca Estate of Toa Baja		2,100.35
Planting of Grass.		
Funds invested in planting manojillo and guinea grass, in the estate Santa Barbara		596.97
Agricultural Implements: In the exploitation of the Estate Santa Barbara, as detailed		8,388.20
Shares of the Spanish Bank—now Bank of Porto Rico, 83 shares		2,490.00
Bills Receivable, as detailed		1,100.00
35 Insular Dock Company:		
Dividends paid, etc.		1,150.00
Slaughter Account, San Juan (as detailed)		218.00
Meat Stall in Santurce		151.00
Fixture Account (as detailed)		918.90
Stock		$193,698.55
Debtors.		
Under mortgage and in Account Current, as detailed		93,329.54
Total Assets		$287,028.09
Liabilities.		
Creditors, as detailed	64,404.42	
Credit Account in the American Colonial Bank	25,000.00	
Credit Account in the Bank of Porto Rico	23,000.00	
Due to José C. de Garayalde, payable March 21, 1912	25,000.00	
Total Liabilities		137,404.42
Net Capital		149,623.67
which belongs to		
Antonio Pizá	127,932.55	
Francisco Pizá	2,959.08	
Ricardo A. Gandia	9,450.33	
Fernando Pico	9,281.71	
	149,623.67	

Addition.

This net capital of		149,623.67
that appears in the inventory of this date should really be considered greater, for the following reasons: for amount for the assets of the house. The estate Santa Barbara in the District of Dorado, consisting of 700 ares of land, of which 400 ares are devoted to the planting of cane: 200 acres to pasture for the raising of cattle; 50 acres to pineapple planting and oranges and 50 acres to mountains for timber and fire-wood, we estimated to be worth today	70,000.00	
and appears in this inventory only for its cost	22,032.80	
Increase		49,967.20
In the cost of manufactured goods, the cost of the factory with its looms, machinery, etc. etc. is not stated, which should be estimated at its cost of.....		4,000.00
The capital actually amounts to.....		$203,590.87

Distribution of profits.

Net profits in the balance of this day		34,439.30
Apportioned as follows:		
Ricardo A. Gandía, 10%	3,443.93	
Fernando Pico, 10%	3,443.93	
Antonio Pizá, 78%	26,862.66	
Francisco Pizá, 2%	688.78	
	34,439.30	
Antonio Pizá		
Previous capital	110,455.30	
Profits 26,862.66		
Less his expenses... 9,385.41	17,477.25	
Actual capital		127,932.55
Francisco Pizá		
Previous capital	2,270.30	
Profits	688.78	
		2,959.08
Ricardo A. Gandía		
His capital		9,450.33
Servando Pico, his capital		9,281.71
		149,623.67

San Juan, P. R. December 31, 1907.

This copy of the inventory consists of 32 folios.

PIZA HERMANOS, S. EN C

36 The plaintiff further introduces the general inventory January 15, 1910, which is admitted by the Court without jection by the party on the other side, and is marked "No. 6."

Document No. 6 of the Evidence for the Plaintiff.

Copy of the General Inventory of the Commercial firm Doing Bu ness in This Market under the Name of Pizá Hermanos, S. en C Taken January 15, 1910.

Assets.

Drills, percales, zephyrs, batists, muslins, linen goods, satteens, nansook, sedaline, domestic, cotton sheeting, prugasteles, cretons, pique, Irish linen, table linen, alpaca, wool cashmere, crea, awning cloth, blankets, undershirts, stockings, caps, handkerkerchiefs, etc. etc. jewelry, etc. as per detail of the whole	69,494.21
Manufacturing Account	
The undershirt factory with 3 looms, etc., etc. and stock on hand, as detailed	1,509.66
Green Hides Account, as detailed	1,354.14
Cattle at Santa Barbara, as detailed	2,726.00
Cash Account	
Cash on hand	1,158.00
American Colonial Bank.	
On deposit in this bank	2,749.83
Bank of Porto Rico	
On deposit in this bank	777.94
Muller, Schall & Co.	
On deposit with them	1,223.21
Estate Santa Barbara.	
This estate, consisting of 640 cuerdas of land and another parcel of 50 cuerdas, the whole in the District of Dorado, devoted to the planting of cane, pineapples and pasture for raising cattle, the cost thereof	20,584.67
Agricultural Implements:	
In the exploitation of the Estate Santa Barbara, as detailed	8,610.93

Planting of cane for 1910:

Funds invested in the planting of cane for the crop of 1910 ..... 8,361.85

Planting of cane for 1911:

Funds invested in the planting of cane for the crop of 1911 ..... 701.86

Planting of pines at Santa Barbara:

Funds invested in the planting of pines for gathering in 1909-10 ..... 13,226.89

Planting of Pines at Santa Barbara No. 2:

Funds invested in the planting of pines for 1911.... 970.73

Estate Sabana Seca.

Cattle, stock of lime, milk, etc. as detailed..... 865.83

Planting of pines, Sabana Seca No. 3:

Funds invested in planting pineapples for 1910..... 1,683.99

Bank of Porto Rico.

83 shares of this bank 3,320.00

Insular Dock Company.

6 shares of this 3,025.00

Estate Girona.

10 cuerdas of land in the District of Dorado, bounded by the estate Santa Barbara and purchased from Mrs. Josefá A. Girona 621.60

Lot in Santurce.

One lot and a part of another in Bayola Ward, Santurce, purchased from Mr. and Mrs. Landon Gutierrez 1,111.30

Slaughter in San Juan, as detailed..... 318.00

Administration of Santa Barbara..... 3,412.72

General Expenses Santa Barbara..... 4,844.05

8,256.77

37 representing expenses for taxes, overseers and employees of the estate, their maintenance, and other expenses of the said estate irrespective of such as are exclusively agricultural, which said expenses should be distributed in proportion between plantings of canes and of pines at the time of their liquidation.

Fixtures, as detailed	980.90
Debtors, under mortgages, and others, as detailed	90,617.66
Total assets	$244,260.97

Liabilities.

Creditors, as detailed, amounting to	117,455.69
Net Capital	126,805.28

which appertains to

Antonio Pizá	107,780.65
Francisco Pizá	3,321.04
Servando Pico	7,913.72
Ricardo A. Gandia	7,789.87
	126,805.28

Distribution of Profits.

The net profits in this general balance that are already included in the capitals hereinabove stated, have been distributed subject to such results as may be shown in due time by the accounts kept in the books of this house under the heading- of

Planting of Cane for 1910,
Planting of Pines at Santa Barbara,
Administration of Santa Barbara,
General Expenses of Santa Barbara,

which represent the expenses that have been incurred in the planting and cultivation of cane and pines actually existing in the estate Santa Barbara, and the result of which could not be exactly known until both crops shall have been gathered and sold.

To Antonio Pizá, 78%	14,116.29
Francisco Pizá, 2%	361.96
Servando Pico, 10%	1,809.78
Ricardo A. Gandía, 10%	1,809.78
	$18,097.81

San Juan, P. R. January 15, 1910.

This copy of inventory consists of twenty-one folios.

PIZA HERMANOS, S. EN C.

PLAINTIFF: I shall now proceed to prove the value of Santa Barbara. In the first place I introduce the initial balance of the firm of Pizá Hermanos, general inventory of Pizá Hermanos, S. en C., taken October 15, 1902. It is admitted by the Court without objection by the other side, and is marked No. 7.

The plaintiff states: I introduce the same for the purpose of showing that the estate Santa Barbara does not figure as the property of Pizá Hermanos at the time of its organization. In that respect

38 I reproduce the inventories introduced, in which, from 1904, the estate Santa Barbara figures as a part of the capital of the firm.

Document No. 7, for the Plaintiff.

Copy of the General Inventory of the Real and Personal Property and Out-standing Credits and Obligations Belonging to the Firm Doing Business in This Market under the Name of Pizá Hermanos, S. en C., Taken the 15th Day of October, 1902.

Merchandise: Batists, muslin, percales, sateen, zephyrs, drills, prugateles, cashmeres, domestics, cotton sheeting, creton, socks, stockings, hats, umbrellas, walking-canes, etc. etc. etc., shoes, etc. etc. etc. as detailed	39,261.06	
Less deduction made on appraisement	1,500.00	
		37,761.06
Green Hides Account, as detailed		744.21
Dry Hides Account, as detailed		1,336.33
Fixture Account, as detailed		1,000.00
La Americana—Stock of shoes in this store		4,148.98
La Bomba—Stock of shoes in this store		4,198.98
Oxen Account—33 oxen valued at		1,000.00
Cash Account—Cash on hand		320.73
American Colonial Bank—On deposit in this bank		5,456.27
Shares of the Spanish Bank—73 shares of this		2,565.54
Arto. E. Diaz & Co., Special Capital Account:		
Special capital in this firm in Arecibo		3,000.00
Remittances for our account, as detailed		1,443.49
		62,352.02
Debtors in Account Current, as detailed		51,634.01
Total Assets		113,986.03

Liabilities.

Sundry creditors, as detailed	52,986.03
Total Assets	113,986.03
Total Liabilities	52,986.03
Net Capital	61,000.00

which belongs to

Antonio Pizá, Capital Account	60,000.00	
Francisco Pizá, Capital Account	1,000.00	
		61,000.00

San Juan, P. R., October 15, 1902.
This copy of inventory consists of 30 folios.

PIZA HERMANOS, S. EN C.

Mr. SERVANDO PICO PEREZ testified, under oath, for the plaintiff: That his name is as aforesaid; that he is forty-eight years of age, merchant by occupation, and an employee of the firm of Pizá Hermanos, S. en C.; that he is general attorney in fact for this firm; that Mr. Pizá is not in the island; that he is now in Mallorca.

The attorney for the plaintiff states: That he calls this gentleman that he may produce before the court the Book of Inventories from which the inventories heretofore introduced have been taken.

The said witness, being questioned as to the book which he produces, says: This book is the inventory book of the firm of Pizá Hermanos, S. en C.

PLAINTIFF: This book is opened October 15, 1902, with an entry by the Municipal Court of San Juan, which reads:

39 "This book of inventories has been presented by Messrs. Pizá Hermanos, S. en C., wholesale and retail merchants of this city. It contains four hundred folios or two hundred leaves, which have been authorized for the above stated purpose, and the seal of this Court affixed thereon; and this entry is made on the first folio thereof, pursuant to the provisions of Section 36 of the Code of Commerce, for legal purposes.

San Juan, Porto Rico, October 15, 1902.

FRANCISCO SABAT,
Municipal Judge.
JOSE P. MANZANO,
Secretary."

Plaintiff asked the witness by whom was this written and he answered: by Mr. Baldomero San Antonio, book-keeper for the firm.

PLAINTIFF: This is the inventory of 1907, folio 140, in which there is the following:

"Addition: This net capital of $149,623.57 that appears in the inventory of this date, should really be considered greater for the following reasons: "There is a comma and it looks as if a period over the same was rubbed out." For amount to the credit of the house." I further desire to have it appear that in all other entries that follow in the account there is a line in blank.

The COURT: What says the other party?

DEFENDANT: Is this witness going to testify again?

PLAINTIFF: He is going to testify twice.

DEFENDANT: Then I reserve the right to cross-examine him at the end.

Mr. BALDOMERO SAN ANTONIO, for the plaintiff, testified under oath: That his name is Baldomero San Antonio; that he is sixty years of age, and by profession a business clerk in the house of Pizá Hermanos, now in charge of the accounts, cashier; that he keeps the accounts of the house since March when Mr. Gandía left; that prior to that position he kept the books and was correspondent for the house of Pizá, book-keeper and correspondent; that in 1907 he was book-keeper.

Upon being exhibited folio 140 of the Book of Inventories, the witness says: That the whole page was written by him; that the date is December 31, 1907; that he cannot say whether the whole of it was written on that date; he cannot say exactly that it was on December 31, 1907, because the balance takes time; probably he wrote it during the whole month of January. The balance is begun by making the inventory and the books are suspended until
40 the general balance is made, and after it is finished, it is inserted in the book. The whole of this is written on the same day. Mr. Antonio Pizá was not here at the time that he should have signed, was not to be found; he was absent in the United States, and it was upon the return of Mr. Pizá that I put in this addition by his order and with the knowledge of Mr. Gandía and with his acquiescence, because he was left as my immediate chief.

The COURT: But the question asked of you and which I believe you have not answered, is whether or not that page was written just as it is on the same day.

WITNESS: When Mr. Pizá came back from his trip it was left unsigned, and upon the return of Mr. Pizá, and upon submitting the same to him as usual, as you will see that all the inventories are signed by him, he called my attention to the fact that in writing here that addition, inasmuch as the statements therein made were not set forth in the books, (the value of Santa Barbara) the same was stated only for the purpose of estimating the amount to the credit of the house, as reports are being asked from the United States relative to the capital, to the financial means of every house, he had recommended to me to insert the same as an explanation; he caused me to notice that this not being in the books, as were the other accounts, it should be stated therein that it was inserted only for the purpose of fixing the amount to the credit of the house, and for that reason it will be seen that it reads: "For the following reasons, for amount to the credit of the house," so as to explain by this that the value of the estate of Santa Barbara, though stated in the books as of about $20,000, it is estimated here at a greater value and in the very accounts of Mr. Gandía, which he knows, and of Mr. Pico, both of whom appear as creditors in the other; and Pizá stated that these being accounts of which they could only dispose on leaving the firm, or upon withdrawal from them of their powers of attorney, or upon the dissolution of the firm, it should be stated here as a part of the capital, as insofar as the credit of the house is concerned they appear as capital, not being creditors like the rest.

PLAINTIFF: My question now is: "On what date was that addition made—for amount to the credit of the house? It must
41 have been in May or June upon the return of Mr. Antonio.

Questioned by the Court, the witness answered: That there is a part of that entry that was written after the other, but not signed by Mr. Antonio; that declarant made the entry on that page and that it was not signed because Pizá was not here and when he arrived he ordered him to put in this addition "for amount to the credit of the house."

The COURT: We are inquiring as to whether the words were put

in after those others were written, that is, some days or some months later.

WITNESS: In May or June, 1908. The words that I put in some months later "for amount to the credit of the house."

PLAINTIFF: After the word "following" was there a colon? I do not remember precisely.

PLAINTIFF: It looks here as if the period of the semi-colon or colon that was made by the witness is blotted out. Yes, sir, I had to do it that way.

RICARDO A. GANDIA, under oath, being questioned by the plaintiff, says: that his name is Ricardo A. Gandía; that as attorney-in-fact for the firm he has seen the book of inventories of the house of Pizá up to the date of his leaving the house, as it was under his custody; that such addition was not drafted in the manner in which it is presented here; it was drafted without the addition to which he has referred; that when he turned over the books such addition was not drafted in the form in which it is today presented to him; I note the addition to these words "for amount to the credit of the house"; they were not in this book then; I refer to the date of my leaving the house, which was March the 11th ultimo of this year; that by that time he was discussing with Mr. Pizá about his leaving the house; he had been considering that since the last days of the preceding December, December, 1909, and on that account there were differences between them; that for the purpose of defending himself the witness made memoranda from some of those books; that the entries that are shown to him are in his own hand-writing, taken from this inventory to consult his attorney, who questions him; the said memoranda are copies of the apportionment of capital and distribution of the profits during all the time that he has been attorney in fact for the firm, with a percentage of the profits thereof.

42

PLAINTIFF: I introduce these documents in evidence.

The COURT: For what purpose?

So as to show that the addition as copied by Mr. Gandía on March 11—the copy that he made—has not the words that are said to have been added "for amount for the assets of the house."

The COURT: What says the other side?

DEFENDANT: I do not accept the same since it is not an authentic document.

The COURT: The Court will admit it for the purpose for which it is introduced, and it is marked No. 8.

Document No. 8 for the Plaintiff.

Pencil Notes.

A copy, the same as written on this statement of the case on page 8, line 20, from the words "total assets" to the words "April 11, 1904."

Same as appears in this statement on page 9, from where it reads "Total Assets" to "November 30, 1905," on page 10, line 10.

Same as Document No. 4 for the plaintiff, set out in this statement, on page 11, line 11, from where it reads "Total Assets" to where it reads "November 15, 1906" on same page.

The note in pencil continues: Same as set out in this statement on page 13, line 17, of Document No. 5 for the plaintiff, from where it reads "Net Capital" to "December 31, 1907" on same page, but excluding the following words: "for amount for the assets of the house" on said page 13, lines 23 and 24, in the said Document No. 5 for the plaintiff, in this statement.

43 Answering the plaintiff, the witness continues: that he used that copy for the purpose of furnishing data to his attorney when consulting him about his rights, by reason of discrepancies that he had with the head of the house as to his profits therein; he does not remember the exact date on which he delivered the same to his employer, but he is sure that it was two or three days before March 11, when he finally retired from the house; that steps have been taken for the sale of Santa Barbara. About February last, in talking to Mr. Pizá, he told me that we could offer it for sale; that he could sell the estate Santa Barbara for $100,000, and to offer it to Mr. Waymouth who has lands bounded by that property. I went to see Mr. Waymouth; I offered to him the estate as indicated to me by Mr. Piza and he asked for an option in writing. I so advised Mr. Pizá who ordered that an option be given him for seven days for $100,000, but already he was withdrawing the buildings on the property from that price; nothing else but the lands. I took that option to Mr. Waymouth, who was not pleased on seeing it because the price was for land only while he had understood from our talks with him that it covered also the buildings, and because it was not signed by Mr. Pizá. He took the option and I know nothing further.

The Court: What says the other party?

44 Defendant: I reserve the right to cross-examine at the end.

Antonio Sarmiento, under oath, testifies:

The Court: What is your name?

Ans. Antonio Sarmiento.

The Court: You may testify.

Witness: I wish to state that in the first fortnight of the month of March, on being consulted by Mr. Gandia relative to his differences with Mr. Pizá, asking him for data for the study of the matter, he brought a lot of data and other copies of instruments and also brought me the copies just introduced. Document No. 8, in the condition in which it is: this must have been from the 8th to the 9th of March of this year, and I have kept it in that condition until the moment of its introduction before this Court.

The Court: What says the other party?

Defendant: Nothing.

Plaintiff: On this point of the addition I wish to call the expert, Mr. del Valle Sarraga. I wish to see whether through expert

testimony the time of that addition might be established; as to whether it may be of May, 1908, as stated by Mr. Baldomero San Antonio, or whether, as averred by Mr. Gandia, it must have been of recent date.

Mr. RAFAEL DEL VALLE SARRAGA, for the plaintiff, testifies under oath:

My name is Rafael del Valle Sarraga, 29 years of age, and chemist by profession.

The plaintiff says that he introduces the witness as an expert chemist for the purpose of showing the respective time of the writing on page 140 of the book of inventories that has been placed at the disposal of the court, and of the addition "for amount to the credit of the house."

The witness, Mr. del Valle Sarraga continued: Before answering the question as to whether I could say whether all the words on this page 140, which is exhibited to me, are written on the same day, I wish to make an explanation concerning the answer that I shall give, and that is that in the matter of examination of handwritings, it is very rarely that the time of the writing may be estimated by the general aspect of the writing, that is to say, by a simple microscopical examination; in such cases it is generally necessary to have recourse to technical examination; the writings must be submitted to the action of reactive substances, the same being submitted to a special process so as to arrive at a true conclusion as to whether a certain writing is older than another. Apparently I do not see on the page anything different from the rest, either in color or in any other respect; now I notice here above that there is an amendment, the word "the"; a word has been blotted out, and the word "the" has been inserted between the words "credit" and "house". It seems that the amendment extends to the end of the word "of" also. I cannot determine whether all of the writing on that addition is of the same date; in order to make an expert report I need to make a chemical analysis. Generally for these examinations one will estimate four or six days, and then an infinite number of obstacles will appear that will extend that term to, perhaps, six or eight days, but approximately ten days may be estimated.

PLAINTIFF: The concrete point on which I desire your expert report is as to whether the words "for amount to the credit of the house" are written on the same day as all the rest of the page.

The witness says: As regard dates I also desire to make an explanation. In such examinations the differences of dates cannot be determined when it is a question of days and, sometimes, of months; now, when it is a question of years it might be determined quite accurately.

The Court says: I wish to ask a question so as to have a concrete question. What is the difference between the parties as to the years?

PLAINTIFF: December 31, 1907. The testimony of San Antonio is May or June, 1908.

The COURT: And Mr. Gandía says that he left the house in March, 1910.

PLAINTIFF: Yes, sir.

46 And the Court continued: Three years difference. If the first part was written two years before that other entry, could you determine from your knowledge within so short a term?

WITNESS: That will depend on the date of the last entry, because if the date of the last entry——

The COURT: Let us suppose that the words "for amount for the assets of the house" were written now, at the beginning of this year, and the other words about the year 1907.

WITNESS: That is to say, more than two years.

The COURT: About two years, or a little over two years.

WITNESS: In order to do that work part of the sentence herein described would be destroyed.

The COURT: Can you do it?

Yes sir; now, I cannot assure that the examination would be completely satisfactory; it depends on the composition of the ink and some other factors.

The witness thereafter continued, as follows: To arrive at such conclusion I would have to do the chemical work, not destroying the whole, but only a part; it would not be necessary to detach the page from the book; the work would be done over the words. The question is purely of a comparative examination. By means of certain reactives I would touch some of the words of the entry which are said to be recent and of the old entry, and by the color or from some other reason I would come to a conclusion as to whether or not they were written on the same date.

The plaintiff says: I would beg the Court to permit Mr. del Valle do this expert work and we could go on with the hearing, because it will have no influence on the other evidence that we shall introduce, and we could come back and continue the hearing of Mr. del Valle on this point.

The COURT: What says the other party?

DEFENDANT: I consider this evidence absolutely foreign to the question at issue, and it may be introduced, but under the protest that I make before this court that I consider this evidence absolutely foreign to the question at issue. If the Court believes that such evidence will tend to make clear something for his conscience and to form his judgment, in that case I will have no objection provided that in some way what is written there shall be reestablished, that it may duly appear in the book.

The Court asks: Could that entry substantially remain?

WITNESS: I could use one or two letters from each word.

The COURT: Without objection on the side of defendant the Court authorizes such class of evidence. The bases for the examination intrusted to the expert, are the following: A witness here has testified that he wrote that entry on the date which it bears, and that later he added the words reading "for amount to the credit of the house;" that he added them posteriorly,

about six months thereafter, that is, in May or June of the following year.

WITNESS: The matter has assumed another aspect. It is not a question of showing whether the writing is of the same date, or whether it was done on a certain date six months before or on a certain date two years before; the matter is already more difficult. In order to do this I would have to have in my possession documents written with the same ink of the date testified to by the witness who wrote that phrase, of the date on which the gentleman thinks that it was written, that is, two years, and a recent one. If such documents can be procured then it can be stated with quite a probability whether it was written at an interval of six months.

The COURT: The person who wrote this page says that he wrote that, but that he later added the words reading "for amount to the credit of the house," some time in May or June of the succeeding year, with a difference of six months from the date that the entry bears; but another party denies that in this year, sometime about the beginning of the year, such words were not there, and it is desired to show that the said words were not written then but that the same were written later; so that what they want to show is whether there is a difference of six months between the two writings, or of two years.

The witness answers: Of course it is very probable that these words written here have been written with the same ink, so that to begin with we could establish the difference between the one and the other, if they were written at the same moment. To make such an examination, as it is a purely comparative examination, I need to have three documents of approximately the supposed difference of time, one of two years, one of six months and another of recent date that were probaly written with the same ink. If it were possible to obtain from the books of the house such writings,
18 then of course the work could be done, because this is one of the most difficult expert questions for an expert chemist. I do not wish to run the risk of destroying part of those words without first explaining the matter thoroughly and without stating just how far I can go.

Questioned by the plaintiff, the witness proceeded, saying: that to determine whether the words "for amount to the credit of the house" were written in May or June 1908, I need a document written on that date so as to be able to compare the results; to determine whether they — written two years ago, I do not, because I have here the other words written on that date; as to the matter of difference between two witnesses, one of whom avers that they were written in May or June 1908, and another one who avers that they had not been written in March of this year, it is not possible if it is not done in the manner I indicate, that is, having two documents of two or three years. The document of two or three years ago, I have it here; I need another document written on the date that you want to know, that is to say, of six months difference from these others. If it be possible to procure a document written, more

or less, on that date, some document of the house that could be identified as of that date.

Questioned by the Court, the expert says: I need a document written with the same ink; generally a person writing in a business house always uses the same ink.

DEFENDANT: But inks are renewed.

WITNESS: But the brands are the same. If in doing my work I come to the conclusion that it is the same ink, then I will continue the work; now, the question as to the age of the document comes afterwards.

Questioned by the Court as to whether the expert having been furnished a document written on the date that he desires it to be, but without being able to say if it was the same ink, could he know if it was the same ink in order to continue the examination, or would he not know whether it was the same ink; because, here, one of the parties says that he could not guarantee that it was the same ink, could you enter into the examination without the assurance, without being assured that it was the same ink?

49

WITNESS: It is quite difficult, it is one of the most difficult works.

The Honorable Court says: I could order the party defendant to produce before me a document of that date, but he would not produce a document written with that ink.

PLAINTIFF: But is it impossible? It is not absolutely impossible.

Questioned by the plaintiff, the expert continued: As to whether or not the ink of the two documents was the same, he could not be assured in an absolute manner, because on an examination of the document he could say whether the ink was prepared with "anilina or campeche," but could not aver that it was the same ink because there are at times inks that are analogous in their composition but different in their components; the best thing would be to procure documents that we would know with sufficient probability were written with the same ink, or that they were written on the same date and by the same person, and in that case we could make the comparison.

The Honorable Court says: We must leave out this evidence because it does not seem just to me to submit these books for expert chemical examination when the expert himself says that he is going to obtain no result.

WITNESS: If I had in that same book writing of three different dates. To determine whether a writing was made on the same date as another, I have already said that it is difficult where it refers to dates that are very near to one another, and it is relative easy when there is a great difference between the two dates.

In answer to the plaintiff, the witness says: To determine more or less the freshness, through a chemical process, of the more or less recent time of writings, it must be by a purely comparative examination; the writings are submitted to a series of reactions; a writing written two years ago or a letter written six months ago is submitted to the action of chemical reactives; from a chemical study of those words it is very difficult to say whether it was written two or

six months ago or two years ago, because it is a question of
50 change in colors which are perceptible only where there is a great difference between one date and the other; a term of two years will be influential, but it is very probable that a writing of two months will react in a manner similar to the writing of one month, with relation to a writing of two years, but there is not the same reaction in a writing of two years as in a writing of six months. I cannot determine the date of the writing by the manner in which it reacts.

The plaintiff introduced a mortgage instrument, which is No. 110 of the protocol of Mr. Juan de Guzman Benitez, dated August 10, 1908, under which the estate Santa Barbara is mortgaged for twenty thousand dollars, setting forth that the said estate is already incumbered by another mortgage of $25,000. It is accepted by the other party and admitted without objection, and marked with No. 9.

51 *Document No. 9 for the Plaintiff.*

Instrument of loan under security executed by the commercial firm of Pizá Hermanos, S. en C., and the American Colonial Bank of Porto Rico, before Juan de Guzman Benitez, Notary, on the 10th day of August, 1908.

The firm of Pizá Hermanos, S. en C., has obtained a loan from the American Colonial Bank in the sum of $25,000.00, for which said amount a note is issued this day to mature within the term of six months, with interest thereon at 9% per annum, and as collateral security for a compliance with the said obligation, the debtors pledged to the said bank several properties:

A. Sugar cane estate, situated in the district of Dorado, in the ward of the town, said estate being known as Santa Barbara, of 644 cuerdas and containing therein a steam engine, a furnace house with flat iron roofing, a flat roof lumber storehouse, another lumber storehouse with galvanized iron roofing, three bagasse houses, a dwelling house, and another two story house that was used as a barracks, flat roof; all in bad condition.

B. A parcel consisting of 50 cuerdas of broken land, situated in the Maguayo ward, district of Dorado, named Monte Rey.

The aforesaid estate Santa Barbara contains, of the property of Piza; Hermanos, 25 yoke of work oxen in good condition, and 100 cuerdas of sugar cane about ready for cutting; 200 cuerdas of land prepared for the same kind of planting, 80 cuerdas planted in pineapples, and 3,184 meters of portable track, 75 centimeters in width, and 36 carts for transportation.

C. An estate without especial name, situated in the Sabana Seca ward, municipal district of Toa Baja, of 411 cuerdas of land, of the old measurement, equivalent, etc., with a two story house built of masonry and lumber, zinc roofing, and a wooden shed; the whole of which is built on the said land.

The said estate contains, of the property of Mr. Pizá (Antonio)

350 head of cattle, consisting of 150 cows and of 200 head of oxen and young cattle.

The estates A and B, hereinabove described, as well as the oxen and plantations contained therein, as hereinabove stated, belong to Pizá Hermanos, S. en C., as to the estates by purchase from Mr. Nemesio Guardiola, recorded, etc., and as regards the oxen and plantations, by purchase and cultivation made for account of themselves; and the estate described under C, with the cattle thereon, belongs to Mr. Antonio Pizá, as to the estate, by purchase from Mr. Julian Pizá, recorded, etc., and as to the cattle, by purchase and breeding for account of the said Mr. Antonio Pizá y Mas.

D. Six shares of the Insular Dock Company of San Juan, belonging to Mr. Antonio Piza, party hereto.

52 E. 83 shares of the Bank of Porto Rico, of which 10 shares belong to the firm of Pizá Hermanos, S. en C., 33 shares to Mr. Antonio Pizá, 20 shares which, though recorded in favor of Mr. Juan Pizá y Mas, yet Mr. Antonio Piza declares that he is the owner thereof through transfer made to him under a public interest, and still lacking the formalities of having been recorded; and 20 shares, also belonging to Mr. Antonio Pizá.

3. Mr. Pizá, for himself, and in his representative capacities, declares that the above described properties are subject only to the following liens:

On the estate Santa Barbara, described under A. and B., a mortgage in favor of Jose C. Garayalde for $25,000, payable March 21, 1912ñ on the Sabana Seca Estate, described under letter C, another mortgage for $9,000, and on the last 20 shares of the Bank of Porto Rico the responsibilities of the office that Mr. Antonio Pizá holds as a director of the said bank.

The said Messrs. Pizá Hermanos, S. en C., through their representative Mr. Antonio Pizá y Mas, and this latter for himself and as attorney in fact for his wife, places a mortgage in favor of the American Colonial Bank, for the aforesaid sum of $25,000 loaned, and for interest thereon, and for interest on delays, until full settlement, plus $2,000 for costs and attorneys' fees.

The liability under the mortgage is apportioned as follows: The estate under "A" will answer for $19,000, interest, and $1300 for costs; "B" for $1,000, interest, and $200 for costs; and "C" for $5,000, interest, and $500 for costs.

Mr. Pizá, as collateral security pledges in favor of the said bank the twenty-five yoke of oxen, and the three hundred and fifty head of cattle and is appointed trustee. He also pledges the six shares of the Insular Dock Company and the eighty-three shares of the Bank of Porto Rico.

The plaintiff also introduces an affidavit taken, by leave of Court and with the intervention of the attorney representing the defendant, from Mr. Thomas Waymouth on this point: It is also admitted by the Court, without objection by the defendant, and is marked No. 10.

Document No. 10 for the Plaintiff.

Affidavit of T. G. Waymouth, taken before the notary, Juan Lope de Goenaga, September 3, 1910, and before the attorneys Juan Bernandez Lopez, representing Pizá Hermanos, S. en C., and
53 Antonio Sarmiento, representing Ricardo A. Gandía Caldentey.

Mr. Antonio Sarmiento, as attorney for Mr. Ricardo A. Gandía requests the Notary, Mr. Lopez Goenaga, to call personally with him on Mr. Waymouth, at his residence. It was so done, Mr. Juan Hernandez Lopez being present as attorney for Messrs. Pizá Hermanos.

Mr. Waymouth, after being sworn by the notary, stated, on being questioned as to whether or not he had been approached with regard to the sale of the estate Santa Barbara of Messrs. Pizá Hermanos, that as deponent is interested in the estate San Antonio, which is bounded by the estate Santa Barbara, he had spoken on several occasions and in a manner entirely informal, with Mr. Gandía attorney in fact for Pizá Hermanos, about the purchase of Santa Barbara, until about the end of February ultimo, when Mr. Gandía told him that they were in condition to negotiate about the sale; that deponent, having asked for an option stating the terms for the said sale, Mr. Gandía brought him a written option which deponent supposes was from Mr. Pizá, which, however, was not signed though it was written on the letter-head of the house and was for a term of seven days, (a copy of which said option by agreement of the parties is hereinafter inserted) and which said option, due to its term, to the excessive price and because it was not signed, has not been answered by deponent up to this date and he allowed it to expire; that he did not ask Mr. Gandía in whose name he was presenting that option but that he supposes that he was doing it in the name of Pizá Hermanos; that he has had no further dealings with Mr. Gandía regarding the purchase of Santa Barbara; that he does not remember having received any offer from Mr. Antonio Pizá himself as to the sale of Santa Barbara.

The option herein referred to, reads as follows:

"Pizá Hermanos, S. en C.—Dry-goods and shoes.—Hides.—Importers, Exporters and Commission Merchants, printed on the letter-head. San Juan, Porto Rico, February 26, 1910.

"Estate Santa Barbara, of 644 cuerdas of land, good for cane and pineapples, and 50 cuerdas in another parcel which we believe to be bounded by lands of Mr. Waymouth at San Antonio. Actually planted: 130 cuerdas first ratoon from cane which is now being cut; 110 cuerdas of plantilla cane the planting of which is about to be finished this year; 70 to 80 cuerdas of pineapples. It also contains three to four kilometers of permanent track and 36 cars or wagonettes, 25 yoke of oxen, a magnificent dwelling-house, a store-house just built for the packing of pines, etc., with forty dryers, modern system, another shed, also large, a machinery

house, and an old molasses house, 15 brood mares, and about 24 horses and colts.- Price on the basis of $100,000 for the lands; plantings thereon and all other things herein mentioned to be subject to appraisement or agreement between buyers and sellers. Option for seven days or until March 5th proximo.

Whereupon the Court recessed until two o'clock this p. m., at which time the plaintiff resumed the introduction of his evidence.

Mr. José Ricarte testifies under oath, questioned by the plaintiff: that his name is José Ricarte, that he is 50 years of age, and engineer and surveyor; that he knows the estate Santa Barbara, property of Messrs. Pizá Hermanos S. en C. of Dorado; that about two months ago he went over the said estate; that prior to that time he had gone over that part thereof adjoining the sea; that he is used to making appraisements of rural properties because of his profession, and that he appraises the estate Santa Barbara in the sum of $80,000 for the whole, lands, buildings, new sheds, track material & wagons.

Cross-questioned by the party defendant, the witness answered: that the value that he puts on the estate Santa Barbara is its sale value; that a rural property may be worth more or less,
54 according to the person who is interested in buying it, or, in other words; a rural property may be sold to better advantage, for instance, to a central bounding thereon, to a powerful land owner bounding thereon, than to a person who is not in such condition; that he fixes the value of $80,000 as the value thereof in general; that he understands that the estate Santa Barbara has about 600 cuerdas, but that he believes that under present conditions 400 cuerdas may be planted in cane, because in these days all kinds of lands are worked, so that about 100 cuerdas could be planted in cane, and the remaining 200 cuerdas for the cultivation to which it is actually devoted, pines, which today is of great value; there are bushes on that property but if there is a man who will work them they will have, of course, the same value as those that are today planted in pines; that he cannot say how many cuerdas are now under cultivation; that he has estimated the lands of the aforesaid 400 cuerdas at $150 per cuerda, and the other land he has figured at ten dollars.

Mr. Santiago Sifre, under oath, testifies: questioned by the party plaintiff.

That his name is Santiago Sifre; fifty years of age, agriculturist, and that he has also devoted himself to appraising rural properties; that he knows the estate of Santa Barbara of Dorado, property of Messrs. Pizá Hermanos, S. en C., there, about the middle of July; that about the middle of July he was on the said estate and went over the property to make an appraisement of the lands, and he estimates that the property without the buildings, is worth $86,000.

Cross-questioned by the party defendant, he answered: That as regards the first, the estate Santa Barbara has about 600 cuerdas, and besides 50 acres of bushes, making over 600 cuerdas; that

the estate contains about 450 cuerdas which he estimates are good as a whole for the planting of cane, the first, and about 150 cuerdas more or less, suitable for pines and the bush lands upon which
55 there is also timber and have been operated to get the timber therefrom which could also be planted in certain products and which consists of fifty cuerdas; that he estimates as the value of each cuerda good for cane, $160., and such as are not good for cane, those for pine and others at $80. per cuerda, and the bush lands at $50. per cuerda; that his experience as an agriculturist as to the sale of rural properties teaches him that it is either easy or difficult in this country; that the topographical situation is influential, and that in that case it is easy. The said estate Santa Barbara has the railroad on the north, on the east the track of the Central Carmen, and on the other side the Constancia Central; that is to say that it is a property in its understanding which it is easy to sell to any one of such centrals, so that it may be sold easily to the Carmen or to the Constancia; it may ship its cane to the Carmen and to the Constancia, to Rubert, and to the Arecibo if it wants to; as to whether any Central may purchase the estate for the price named by him, that is another matter; that depends on the rate quoted and such is the rate that is being quoted in the island, and they are being quoted higher than those conditions; that the buildings on the property are not included in that price; that the prices that he places on the buildings, the property has a magnificent dwelling house which, in his opinion, is not worth less than $5,000, and besides it has a stable, another shed and the old factory, including some old machinery which is there, and the whole of which may be worth $5,000.

Mr. RICARDO A. GANDIA, questioned by the plaintiff, testified under oath: that document No. 1, which is exhibited to him, the account current of declarent with Messrs. Pizá, on leaf No. 25 of the said document, the entry at the end of the balance had not been made or written at the time that the witness left the firm; that as regards the inventory of 1910, the same was not finished when he left the house, the inventory of the stock had been taken, that is to say, account had been taken of the stock in a book in pencil, but what is really called the inventory of a house was not finished, the assets and liabilities, so that the valuation had not been made, only a list of the stock had been made, but the book-keeper
56 had not finished his operations as to the balance.

PLAINTIFF: So that the entry found at the end of this balance, which is at folios 172 and 173, and which reads "the foregoing profits have been distributed, as stated in the Day Book on this same date, and at folio 206, reserving such result as may appear at the proper time from the accounts set forth in the books of this house, under the headings of Cane Plantations for 1910, Pine Plantations at Santa Barbara, Administration at Santa Barbara, General Expenses at Santa Barbara, which represent the expenses incurred for the planting and cultivation of cane and pines now existing on the estate Santa Barbara, and the result of which will not be known

exactly until both of said products shall have been gathered and sold." This inventory, although not signed by Messrs. Pizá Hermanos, we have of course no objection in affirming that what they have delivered to us is correct. I also desire that the record shall show the entry on the account current.

The COURT: The document remains here.

Questioned by the plaintiff, the witness says: That when he left the house there was planted at Santa Barbara, about 120 cuerdas of plantilla cane and about 20 cuerdas of ratoon cane; in pines, at Santa Barbara, 80 cuerdas; at Sabana Seca, 30 cuerdas of pines, there was or there is no cane.

Questioned by the Court, the defendant said: That he is going to introduce him as a witness.

Testimony under oath of Mr. PEDRO SANCHEZ, who, being questioned by the plaintiff, stated: That his name is Pedro Sanchez, that he is 24 years of age, actually book-keeper for Piza Hermanos; that he has not always been bookkeeper for Pizá; that on two occasions he has discharged certain positions in the house; that lately he has been employed with Messrs. Pizá, since January of this year, at the beginning as an office assistant, making out bills and typewriting, and afterwards by reason of the fact that a person was needed to occupy the vacant position at the books, he was assigned to that position of bookkeeper since the end of the
57 month of March of the present year; that the inventory of January 15, 1910, is written by declarent; that he does not remember the precise date on which he wrote the same; that he believes it was in the second fortnight of the month of March; that he copied the same from a rough blotter that had been written in pencil by the person who had been discharging the position of bookkeeper, Baldomero San Antonio, who was the one who did the work of the balance; that the date up to which the books of the house were when declarent took charge of the bookkeeping for the house in March of this year, was January 15th.

The COURT: What says the other party?

DEFENDANT: Nothing, just now.

PLAINTIFF: I now submit to the Court a demand made on Mr. Antonio Pizá, at the request of Mr. Ricardo A. Gandía, through the Notary Julio Cesar Gonzalez, Notary Public, to deliver to him the balance in his account current and the balance in the net profits of the house, and the answer of Mr. Pizá. The demand was made March 12, 1910. They are admitted in evidence without objection and are marked with Nos. 11 and 12; the demand with No. 11 and the answer with No. 12.

Document No. 11, for the Plaintiff.

Demand by Mr. Ricardo A. Gandía y Caldentey on Mr. Anton
Pizá y Mas, on the 12th day of March, 1910, through Mr. Ju
Cesar Gonzalez, Notary Public.

Mr. Gandía requested the Notary, Mr. Gonzalez, to demand of M
Antonio Pizá y Mas, as managing partner of the commercial fir
of Pizá Hermanos, S. en C., of this market, and to make known
him:

To deliver to him, in the name of Mr. Gandía, the balance show
in the private account of the latter with the said firm. To ratif
the notification personally made by him over a month ago, and t
take notice that from and after this day he ceases in his capacit
as an employee and attorney in fact of the said firm, resigning hi
power of attorney of the said firm that had been vested in him
the duties of which he ceased to perform yesterday, and to delive
to him a copy of the balance of liquidation of profits for his ap
proval or objections, as an act incident to the delivery of the par
accruing to the said Gandía in the said liquidation.

Demand: On the said twelfth day of March I went to the office
of Messrs. Pizá Hermanos, and Mr. Antonio Pizá being present, I
notified him of the preceding demand by delivering to him a copy
thereof, and being acquainted with the contents thereof, he an-
swered: That he will consult his lawyer this afternoon and will
later call at the office of the Notary to answer this demand.

58 Mr. Gandía being present, takes notice of the contents of
the answer and states that pursuant to his instructions to me
that this notification was to be in one act alone, that insofar as he is
concerned, he considers the same at an end.

Document No. 12, for the Plaintiff.

Answer given by Mr. ANTONIO PIZA, as acting manager of the
firm of Pizá Hermanos, to the demand made by Mr. Ricardo A.
Gandia, in writing, before me, Julio Cesar Gonzalez, on the 12th
day of March, 1910, which said answer reads as follows:

On the same day, and being the hour of two o'clock in the after-
noon, complying with his promise in the preceding answer, Mr.
Antonio Pizá called at my office and answered: that as managing
partner of the mercantile firm doing business in this market under
the name of Pizá Hermanos, S. en C., and being conversant with
the preceding demand, he states: As to the first part thereof that he
is willing to comply strictly with the agreement in Clause 7th of the
instrument of organization of the firm of Pizá Hermanos, S. en C.,
namely, to deliver to Mr. Gandía his ten per cent of the net profits,
after a proper inventory has been taken, in such property as the said
net profits may consist, that is to say, 10% of such amount as
may be on hand in cash; ten per cent of such amount as may accrue
from outstanding credits, as the same are collected and a ten per cent

of the total value of the real estate entering into such net profits as well as such stock of merchandise of the firm as may result, and which is also comprised in the said net profits. As to the second part, Mr. Pizá states that the general inventory has been taken and the balance of net profits has been struck, but that the same is still pending on revision and rectification, so as to finish the same and make a clean copy thereof, which will be done within a few days, and that when it is done, a copy in due form will be delivered to Mr. Gandía. And Mr. Pizá states further that the liquidation of net profits shown in the balance and which are represented by real estate and merchandise is to be made by the firm of Pizá Hermanos, according to law.

PLAINTIFF: I asked Mr. Pico to come into Court bringing with him the copy books for October and November of last year. From the copy book for October, a letter dated October 29th, 1909, addressed by Messrs. Pizá Hermanos to Piza Hermanos of New York, and another letter addressed to C. V. Smith & Company of New York, dated November 16, 1909. In the letter of October 29, to Messrs. Pizá Hermanos, S. en C., of New York, Messrs. Pizá Hermanos, of San Juan, say the following:

The COURT: The stenographer will make entry that Mr. Pico, attorney in fact for the house of Piza Hermanos, produces the foreign copy letter book of Messrs. Piza Hermanos in which there is a letter reading:

PLAINTIFF: In a letter addressed to Messrs. Piza Hermanos, of New York, at page 445, which reads: "It will matter nothing that out of the ten boxes that we are to ship later some of them shall be lost for want of a buyer at the moment; what is important, as-
59 hereinabove stated, is to make connections and acquire clientage so as to be able to place the important production that we are going to have, which we estimate at from 16,000 to 20,000 boxes during the next few months, and for some months later in the next succeeding year about 30,000 boxes more." And in the same copy book, at folio 548, a letter dated November 16, 1909, addressed to Messrs. C. V. Smith & Company, 323 Washington Street, New York, in which it is said: "We appreciate your efforts in defense of our interests and we wish that in the future you will do all in your power so that the result will be more favorable to our interests, as we shall have for shipment within the next months from 25,000 to 30,000 boxes of that fruit, and we desire to have in that city a house to which we could entrust our fruit with full and complete confidence."

In the preceding paragraph reference to fruit is being made.

The COURT: It is set forth that that letter refers to pines in the preceding paragraph thereof.

Testimony under oath of Mr. RAMON CALDERON who, being questioned by the plaintiff, answered: That his name is as aforesaid, 39 years of age, agriculturist, which is his present occupation; that he is an employee, overseer and agriculturist for Don Antonio Alvarez in the plantation "Progreso" of Carolina; that he has been

an employee of Messrs. Pizá Hermanos, S. en C. in Dorado, also as overseer and agriculturist at Santa Barbara, since August 22, 1908, and that he left, though unable to specify the day, in November of the following year, 1909; that he devoted himself on the estate of Messrs. Pizá Hermanos to the planting of cane; that when he left in 1909 he had left planted on the estate Santa Barbara 115 cuerdas of "plantilla" cane and 20 cuerdas of ratoon cane, which lacked but a short time for cutting; it was already the month of November, and for that reason two and one-half months were lacking for the cutting thereof; that he figures the value of such plantation in the middle of March of this year, he estimates that the 150 acres of "plantilla" cane could yield, in his opinion, 600 quintals per cuerda, and the ratoon, which was another kind of cane, could yield 400; that is what he thinks; that a quintal of cane yielded five and
60 three-quarter pounds of sugar; that on that date there were different prices, in different fortnights, that they fluctuated between 4.08 and 4.30; that on the value of that cane, had it been sold during March of this year, no increase could be made over that appraisement of 600 quintals per cuerda. An estimate could be made. They would yield $138 gross per cuerda for the 600 quintals; the expenses per cuerda should be figured at $60; specifically, in March, they might have been worth net, after deducting the $60, $78. per cuerda.

Being cross-questioned by the party defendant, the witness replied: That he was overseer and agriculturist at Santa Barbara, and that he left the plantation about November; that he left the property, gave up his position, of his own will; that he had had no trouble with Messrs. Piza, the owners of the estate; that he figures a cuerda of cane at 600 quintals.

To a question by the said defendant, as to whether the witness was sure that all the cuerdas of cane in this district have yielded that production, the witness said that such is figured on an average.

DEFENDANT: My question is not as to an average; if you can assure that the cuerdas of cane of the district have produced 600 quintals per cuerda in the last crop.

WITNESS: Plantations have an average, for that reason I calculate 600 quintals per cuerda, because that was cane that I planted in November 1908, to be gathered in February or March of 1910, and for that reason it is highly cultivated cane; the other cuerdas of cane of the district, being of the same quality, may yield more because I was in Coamo and they told me that they yield more. In this district they may yield 1000 or 400, according to the quality of the cane; that production of 600 quintals per cuerda may vary according to the quality of the cane; that before gathering the cane, before it is cut and taken to the mill in which it is to be ground, approximate estimates may be made as to the net production, and such estimates cannot vary much; mistakes may be made, but never great; that it may be possible that a certain cane in November, which according to an approximate estimate may yield 600 quintals per cuerda, if before the same is cut, in March, it suffers whether

prejudicial thereto, the yield thereof may be largely dimin-
61 ished. Relative to a decreased production through excessive sun or excessive rain, not so much through excessive sun after the crop has formed, and much less in such case through rain, now, if there is a hurricane, or something like it in which there is a loss of cane, or if the cane is small, it cannot be estimated; a cane which is fully developed may dimish 20 or 25 quintals per cuerda; that the price of sugar fluctuates from day to day, it goes up and down, it might be better one day and worse the next, and for that reason, we have this year prices ranging from 4.00 to 4.30.

Testimony of the witness Mr. SANTIAGO SIFRE, who, having been sworn, answered the plaintiff: That his name is Santiago Sifre; that he has stated before that he had inspected the plantation Santa Barbara and has seen the cane planted thereon, the value of which said cane, in March of this year, of the "plantilla" cane planted in those lands, and in view of the condition of the ratoon cane of this year, judging by the growth which it has, could not have been less than 600 quintals per cuerda, and the ratoon cane 400 quintals; the ratoons are from cane that has been cut; the quantity of sugar that it yields, more or less, is according to the percentage at which they have been sold to the central; the rate of selling to the central varies; there is a rate of five and three quarters, there is a rate at six and at five and one-half; the value of such cane as I have seen of "plantilla" and of ratoon, the price at which that cane might be valued in March of the present year, is 600 quintals per cuerda at five and three-quarters; the price of sugar was on an average $4.00; of plantilla cane there were 115 cuerdas there last year, and 20 cuerdas of ratoon cane.

Cross-questioned by the defendant, the witness said: That he has testified before that he saw the cane about the middle of July, when he was on the property; that in July a large part of that cane had been already ground; that what he saw there was the ratoons from that cane, and the plantilla that is there now for 1911; that on that basis, and on what he saw, he bases his estimate as to what
62 should be the production of plantilla cane in that kind of land; that it might happen that many times there would be difference in the estimate; that an agriculturist may figure on a yield of so much or so much more, and that then, after the sugar is sold, he will have a shortage, or maybe an increase, and it is logical that such estimate may vary according to the result obtained from the sale of the sugar.

Mr. ARTHUR C. HANSARD testifies under oath, and answers the questions propounded by the plaintiff: That his name is Arthur C. Hansard; sixty-five years of age, actually without a profession; he has been an agriculturist in the Island of Porto Rico, in the northeastern part of the island, of coffee and pines, and several other minor products of the island; further, that he has been a government employee as assessor of property, chief assessor of urban and rural properties; that he has had many occasions of assessing pineapple

lands; that he has seen the pineapple plantations that Messrs. Pi
Hermanos have at Santa Barbara and at Sabana Seca; that he cann
say precisely the number of cuerdas that he has seen, but that it is a
proximately about 80 cuerdas at Santa Barbara and 25 or 30
Sabana Seca; that because of the inspection that he had made
the said pineapple plantations, in the one and the other locality
he can estimate the value of the said pines in March of the presen
year at a net price of $427 per cuerda and $750 gross.

Cross-questioned by defendant, the witness answered: that in orde
to make the appraisement made by him, for each cuerda of pine
apples he estimates a price for the pines sold in New York, accord
ing to size, which he estimates at 30 pines per box; it is called 30
which is the average that may be estimated, thirty pines to the
box, at $2.50 as an average. A cuerda of pines will yield 300 boxes,
which is $750.; that he figures for expenses of cultivation, gathering,
transportation, freight on pine-boxes laid in New York, $323, per
cuerda; that the price of pines in boxes fluctuates; sometimes it may
be less, but in the reports I have not found less than $2.50 and I
have found up to $3.00 per box of 30's; that the production which
he estimates for each cuerda of pines is understood to be
63 with the proviso that the cultivation and gathering thereof
should take place under normal conditions; there might be
climatological accidents or of some other order that would alter that
yield per cuerda of pine; that, of course, an agriculturist can have
no assurance as to what the production will be until he has gathered
and sold the pines.

Testimony under oath of Mr. JAIME R. NOBLES: Questioned by the
plaintiff he answered: That his name is Jaime R. Noble, forty-
five years of age, government assessor of properties, urban and rural
particularly rural; that besides he is a property owner and an
agriculturist; that he has been all his life an agriculturist and that
he is also engaged in the cultivation of pines, and is so at present,
here, at Isla Verde, where he has pines planted; that he has seen
the plantations of pines that Messrs. Pizá Hermanos, S. en C. had at
Santa Barbara and at Sabana Seca; as to the value of said plantations
in March ultimo, that he might place a value thereon because he saw
them a little before that time and remembers that on seeing them
he remarked that they were some of the prettiest plantations that he
had seen up to that time; he had seen pines everywhere, but these
called his attention particularly; he went there and visited such of
them as called his attention most; it was difficult to figure the cuerdas
of pines at it was a large quantity, over 60 cuerdas, particularly at
Santa Barbara, and the pines promised then at least 9,000 pines per
cuerda, which is, after deducting ten per cent. He estimates from
the manner in which they were planted at that time 10,000 to the
cuerda, and 9,000 pines, 30 pines to the box, will make an average
of 300 boxes, and the value is something like $2.50 per box. That
he fixed this price because he learned that the price for the last
crop for the Growers' Association was even higher; he believed that
it was $2.80 and over, and 300 boxes at $2.50 will make a cuerda

$750.; the expense could only be stated approximately because it must be considered that slips will cost a little less on that property than elsewhere as one property was supplied by the other, and it may be estimated at $170.; a cuerda of pines is figured at
64 $200. more or less, but there less may be estimated, $170 per cuerda for cultivation and about $150 more for packing and shipping to the United States; that the net production of each cuerda of pineapples, of such as he had seen, is around $400; that he did not pay much attention at Sabana Seca, but that the land there is better and should yield that much at least; that it seems to him that there were more than 30 cuerdas at Sabana Seca.

Cross-questioned by the defendant, the witness said: That he saw the said plantations of pines shortly before March ultimo; that he saw them for the reason that he went there to spend a day and at that time he had nothing to do and went expressly to see those pines, as he had been to Mr. Lippitt's house and had gone to several other places because he had had a good deal of trouble with his own pines and wanted to compare other plantations with his own, particularly certain yellow plantations that he had because the pines were near the sea and the result there is not what it was with the pines of the declarant; that the pines were green and very pretty and for that reason, I tell you, it called my attention that such plantation was so good; that he owns plantations good for pines and that in his pine plantations it does not happen as in those he saw; that up to this date he has had no loss in his pine plantations, but that he has spent more money on his own; he did not find there such troubles as he had met with on his property; that he does not remember having asked Pizá Hermanos, or having estimated the amount that they had expended on those pines per cuerda; that he did not ask Pizá Hermanos as to the amount they had expended in the cultivation of those pines.

The plaintiff says: To finish my evidence I introduce the instrument of organization of the firm of Pizá Hermanos so as to show that Mr. Ricardo Gandía had no intervention therein.

65 It is admitted without objection and is marked as evidence for the party plaintiff with No. 13.

Document No. 13 for the Plaintiff.

Instrument of Organization of Partnership.

In San Juan, Porto Rico, the 27th day of October, 1902, before Mr. Damian Monserrat, Notary, appears:

Mr. Antonio Pizá y Más, of lawful age, etc. He appears for himself and as attorney in fact for his brother, Mr. Francisco Pizá y Más, of lawful age, etc.

Organization of Partnership.

He states that he has agreed with his principal upon the organization of a commercial firm, under a special partnership, which will be

governed by the clauses hereinafter stated, and by the Code of Commerce, etc.

Mr. Antonio Pizá y Más, and his brother Francisco, of the same surnames, organized a special partnership under the name of Pizá Hermanos, S. en C., the said Mr. Francisco having therein the character of silent partner and the said Mr. Antonio of Managing Partner.

The management and administration of the property of the firm and the right to sign the name of the firm shall be had, conformable to law, by Mr. Antonio Pizá. The domicile thereof shall be in this city, without prejudice to the establishment of branches in the island. It is organized with a capital of Sixty-one thousand dollars of which Sixty thousand dollars belonged to the managing partner, Mr. Antonio Pizá, and One thousand dollars to the silent partner, Mr. Francisco Pizá y Más, which said sums have been brought into the firm by each of them in cash, merchandise and credits. It shall last for five years from and after the 15th instant, the said partner, Mr. Antonio reserving to himself the power to modify or dissolve the same before the term fixed. In addition to monthly trial balances, a general balance will be made every year so as to know the condition and standing of the firm.

66 Such net profits as shall be obtained at the expiration of the company, shall be distributed in the following proportion: 78% for the managing partner, Mr. Antonio Piza y Mas; 2% for the silent partner Mr. Francisco Piza y Mas; 10% for the employee of the house, Mr. Ricardo A. Gandia y Caldentey, and another 10% for Mr. Servando Pico y Perez, also an employee, who shall, besides, enjoy and receive the salary which has been assigned to them as such employees, and in case that it shall be convenient to the managing partner to discharge the said employees from the house, or that the latter withdraw from the firm of their own will, the proper balance will be made, and in accord therewith such part of the profits as may accrue to them shall be delivered to them proportionately in cash, stocks, accounts and other property of the firm. As regards losses, should there be any, the same shall be sustained by the two partners only, in proportion to the capital of each of them.

Expenses such as house-rent, etc., shall be sustained by the firm and will be charged to the account of general expenses in the same manner as the sum of Two hundred dollars that may be disposed of monthly by the Managing Partner, Mr. Antonio Piza.

In case of the death of the Managing Partner, the firm shall be dissolved; not so, however, in case of death of the silent partner.

This company accepts the appointment of liquidator of its predecessor Piza Hermanos.

Evidence for the Defendant.

Testimony under Oath of Mr. RICARDO A. GANDIA.

In answer to questions by the party defendant:

My name is Ricardo A. Gandia; I believe I entered as attorney in fact, and not as a clerk, of Piza Hermanos, S. en C. on the organiza-

tion of the last firm, October 27, 1902; it was on that date that I entered as attorney in fact, earning a salary of $140 monthly,
67 and receiving, besides, 10% of the profits; I entered into averbal agreement with Mr. Antonio Piza, the only managing partner of the house; he told me that my companion, Pico, and myself would also be attorneys-in-fact of the house that was to be organized, and that we would enjoy 10% of the net profits, and that the said 10% would be distributed annually. That was the understanding that we had: that the profits would be distributed upon the making of balances, when such profits are known as is usual in business; I believe that Mr. Servando Pico entered together with me as attorney-in-fact, but not under the same conditions: I had more salary than Mr. Pico, the same profits: I believe that the salary of Mr. Pico was $100, nothing more, but the profits were the same—10% (ten per cent).

I decided to withdraw from the house, to work for myself, more independently, about the year 1908, and when December came, which was the time for making balances or when they should be made, I so informed the head of the house.

The chief talked to me and told me that perhaps such a thing would not be to my advantage, to think it over carefully, and as it is commonly said, he smoothed me over and fixed me up with pretty words and I promised him to remain with the firm as he had suggested, for he was telling me "you wait this year," and I so promised him.

The year of 1909 transpired, and at the end thereof my intentions were the same as in 1908, and I again repeated to him the same desires: that I wanted to withdraw from the firm and offered him that whenever my services were needed by the house for anything, I was ready to serve them. He was also cordial to me in his statements and told me that at any time that I should want to return to the house, the doors were open for me. All of that while we had not begun to talk about interests. As soon as I began to talk about interests, there were not so many manifestations; there was already some difference of opinion because he said that we were to take an inventory and I, as a matter of self respect, did not want to
8 intervene in any of the operations of the balance. I left it absolutely to him to do as he pleased. He did as he wanted regarding profits and loss, and about February, when I saw that the result of the balance was not what I expected, I called the attention of Mr. Piza to it and told him—this is a balance of separation, of dissolution in so far as I am concerned, and, therefore, I believe that all such accounts as should show either a profit or a loss should be brought into the balance, and there is a lot of accounts that should show a profit which I do not see estimated. This was when the result of the balance could not be known from the general look. And he asked me which were those accounts? I said, of course, the estate Santa Barbara, of which no valuation has been made and which is an integral part of the assets of the house; two accounts of plantings of pines for 1910 and 1911 at Sabana Seca; other accounts of plantings of pines, one for 1910 and another

for 1911 at Santa Barbara; the cane account for 1910 and 1911; fact, several thousands of dollars invested in cultivation that had been appraised and which are also an important asset of the hou the shares of the Spanish bank which were at $30 only, and w being sold in the market at $45. He immediately accepted matter of the shares, but as regards the estate and cultivations, he tations and statements began; sometimes he would tell me one thi and at other times another; in the morning I thought that we w going to part in perfect harmony; at noon I thought it was other; and in the evening we thought that we were going to bre loose because as yet I have not been able to learn what Mr. Pi expected.

I do not believe that he expected that I was going to be so s premely a fool as to withdraw from the house leaving the esta Santa Barbara unappraised, which had cost $12,000, and which have estimated to be worth $80,000; without appraising the plant tion; that I was going to withdraw also with a balance on the cred side of my account, without estimating the assets, with what ha been credited to my account or that still remained to be credited Finally, I went so far as to express to him my desire to have friend of his and friends of mine appointed to look for some kind of settle ment between us.

69 That was after having proposed to him appraisers and hav ing called his attention to the fairness and justice, of which I believe we should avail ourselves at that moment, to the end that an appraisement of the whole assets of the house might be made. But he refused the proposition for appraisement of the assets that had not already been appraised, to be done by appraisers, and lastly, he also refused the proposition of friendly arbitrators, friends of his and friends of mine, who might be willing to settle our matters. I had such a confidence in the justice of my right and of my cause that I even proposed to him to submit myself to such of his and my friends as he might appoint, and he did not accept it either. In such a difficult situation as he was placing me, I told Mr. Piza that for self-respect I thought I should no longer intervene in the busi ness of the house in such an active and intimate way as I had been doing up to that moment, and I told him that I desired to turn over the duties under my charge and withdraw from the house. He told me that if I wanted I could turn them over to Mr. San Antonio. He called San Antonio and I turned my bureau over to him and I told him to inform Mr. Piza that everything had been received by him all right. I tore up some old papers that I had on my desk and again addressed Mr. Piza, asking him to give me Two thousand dollars of the sum that was already credited to my account. In explanation of this last statement I ought to say that seeing that we could not come to an agreement regarding the appraisement of the assets of the house, I asked him one day what was his decision with regard to my private account, regarding the amount to my personal credit in the house, and he answered me that that was not under discussion; that that amount was mine; that if I wanted he could turn it over to me in monthly sums, and that if I wanted some amount imme-

diately, that he could give it to me also. Based on these statements of Mr. Piza, I did not talk to him again regarding my leaving, and as I was leaving, I told him: "In accordance with our talk, I need Two thousand dollars." Angrily he turns and tells me: "No; I have the right to retain the funds until we settle." In view
70 of this statement, that surprised me so greatly, I had no other course but to apply to my lawyer and friend to defend me in court against that which I considered, do consider, and continue to consider as an abuse.

I cannot state specifically which were the differences that I had with Mr. Pizá because even now I do not know them. I told him that the estate Santa Barbara was worth $80,000; at the beginning he was talking of $60,000; $70,000.

With regard to the question as to whether or not my lawyer informed me of the proposition of Mr. Pizá to take over Santa Barbara for sixty thousand dollars, liquidate the plantations and everything else to be just as it was stated in the final inventory, I say:

The recollection I have of the statement of my lawyer is that Pizá accepted the valuation of $60,000, in conference with the lawyer who questions me, and that he refused any appraisement on cultivations; that cultivations were to be subject to the result of the harvest.

The defendant asks the witness:

Did it not happen that one day, in one of the several conferences that you had, did it not happen that one day Antonio Pizá authorized you to go out and sell Santa Barbara, to look for a buyer for Santa Barbara?

WITNESS: No, sir; the only thing there was in that respect was that he authorized me to offer it to Mr. Waymouth; it must have been in about February. He told me that he would sell Santa Barbara for One hundred thousand dollars, and to offer it to Waymouth.

Whenever Mr. Piza was not here, in the absence of Mr. Piza, I always acted as chief in accord with my companion Mr. Pico; in the absence of Mr. Pizá we were the chiefs of the house and we endeavored to act in accordance with his instructions; in any matter that we considered of importance, we asked for instructions. Mr. Pizá was very frequently absent; generally the two of us managed the business house; we made plantings on the estate Santa Barbara and at Sabana Seca; those plantations were a branch of the business of
71 Piza Hermanos; at the beginning no account of administration of those plantations was kept, afterwards he ordered the opening of the said accounts of administration and general expenses which, in my judgment, came to make accounting difficult; but, as he was resolved when he gave an order, whatever he ordered was always done. I cannot remember the date when that administration account was opened; it was sometime before I left the house; as to the date I would go by what the lawyer has in front of him of the books of account of the house. I refer to the dates stated on the same accounts; upon the organization of the firm of Piza Hermanos, S. en C., two or three months after the execution of the instrument, when it was returned from the Commercial Registry, I noticed the

terms thereof and saw a clause in that instrument in which referer
was made to me and Mr. Pico; I did not object to that clause to M
Piza.

After the expiration of the firm of Piza Hermanos, S. en C., he e
tended it under another instrument. I saw the instrument of exte
sion also quite some time after it was executed, and came from t
Registry, but I saw it.

As to whether or not I saw if the extension was under the sam
terms as the original instrument, I would say: I saw the instrume
on the outside and that he was extending it, but I do not remembe
having read the instrument; I only have a recollection of a verbe
statement, I do not know whether by Mr. Piza or by my companio
Mr. Pico, that it was extended for the same term as the former; tha
is the true impression that I remember that I have of that fact; whe
I left the house the balance for January 15 was being made; I lef
the house March 11; on that date we were about finishing the opera
tion, that is, the inventory had already been taken; the thing tha
had not been finished was the general computation of the assets and
liabilities so as to show as a result the profits or net gain of the house;
so that, when I left the house on March 11, the profits for distribution
appeared on the credit side of the profit and loss account; they were
pending on January 15 because the book-keeper by direction
72 of the chief of the house had suspended operations on the
books due to, I believe, the disagreements between the chief
and myself concerning matters of interests, so that the operations of
the balance were in that condition, the profits of Eighteen thousand
dollars on the credit side of the Profit and Loss Account, undis-
tributed; the accounts were suspended. I do not know why they
were suspended; the balance was without apportionment of the profits
without having that accessory entry inserted therein. The balance
had not been clean copied; it was on a blotter; the valuation of the
stock of merchandise was on a blotter in pencil; it had not been clean
copied; neither that nor anything else constituting the assets and lia-
bilities of the house, which are the accounts and the indebtedness,
etc.

I asked the house for an abstract of my account current and it was
denied me; I did not ask for the account of plantations; I do not
remember having asked for it up to the date that I left the house.

Mr. SERVANDO PICO, under oath, testifies for the defendant:

That his name is as aforesaid. I am attorney-in-fact of the house
of Piza Hermanos, S. en C.; I am an employee of the house since
1901; I was an employee of the old house of Piza Hermanos; I en-
tered the other firm. When the present firm was organized, in Oc-
tober 27, 1902, I entered as part of the personnel of the said new firm,
as attorney-in-fact, at a salary of One hundred dollars per month and
ten per cent of the profits.

DEFENDANT: Where was that ten per cent of the profits assigned
to you?

PLAINTIFF: I object to the question. The terms that Mr. Pico

might have agreed upon with Piza Hermanos are not the object of this suit.

DEFENDANT: I have asked Mr. Gandia before whether Mr. Pico and Mr. Gandia had the same profits in the house, and he said that they had under the same agreement; therefore, it is a matter that has already been accepted.

The COURT: Mr. Gandia stated before that he had a contract with Mr. Piza.

DEFENDANT: Besides, there is a fact in the answer that
73 concerns Mr. Pico, and as to that fact I have the right to question. Here it is stated: "In the said instrument of organization of partnership, among other clauses that are not pertinent to the case, there is the following:

'Such net profits as may be obtained shall, at the expiration of the term, be apportioned in the following proportions: 78% for the managing partner Mr. Antonio Pizá; 2% for the silent partner Mr. Francisco Pizá; 10% for the employee of the house Mr. Ricardo A. Gandía, and another 10% for Mr. Servando Pico, also an employee, who shall, besides, enjoy and receive the salaries assigned to them as such employees, and in case that it shall be convenient to the managing partner to discharge the said employees from the house or that the latter withdraw from the firm of their own will, the proper balance will be made, etc.'"

So that these gentlemen are joined here.

The COURT: Joined to the plaintiff by virtue of the public contract?

DEFENDANT: Yes, sir.

The COURT: The Court dismisses the question because the court understands that the terms under which Mr. Pico might have been with the commercial firm of Pizá Hermanos can in no way affect the terms under which Mr. Gandia might have been in the said commercial firm; therefore the question is dismissed.

DEFENDANT: I take an exception.

DEFENDANT: Was Mr. Pico with the house under the conditions specified in that clause of the instrument of organization of partnership?

PLAINTIFF: I object to the question. The conditions of the contract of Pico with Pizá have nothing to do with the questions under discussion here.

DEFENDANT: I believe they have.

The COURT: Objection of the party plaintiff sustained.

The defendant continued with his questions, and the witness answers, I do not know the terms under which Mr. Gandía was with the house; I do not know anything else except the terms in the contract, 10% and the salary of One hundred and forty dollars, without knowing the other contracts that he might have with Mr. Antonio Piza. I do not know whether or not there was between Mr. Ricardo Gardía and Mr. Antonio Pizá, any special contract other than the terms stated in the instrument of organization of the firm.

I managed the house of Pizá Hermanos, S. en C. jointly with Mr.

Gandía; among the acts and operations of that firm there wa
74 the administration of the estate Santa Barbara and Saban
Seca. In the administration thereof an account was kept o
the cultivation of each plantation existing on the property, such as
Cattle Account, Cane Account, Pineapple Account, and other ac
counts that were kept, and later on, about three years ago, the chie
of the house ordered the opening of an Administration Account and
a General Expense Account. The General Expense Account is kept
for the estate Santa Barbara only; the estate Sabana Seca was under
other conditions. For the estate Santa Barbara, besides the account
for cultivation and the Cattle Account, a General Expense Account
and an Administration Account was kept. General and other ex-
penses are charged to one account, and the Administration Account
is charged with the salaries of employees and with such other ex-
penses as are deemed to be administrative.

Mr. Ricardo Gandía left the house on March 11, 1910. At the time that Mr. Gandía left the house there were plantations and cultivations on the estates Santa Barbara and Sabana Seca; there were cane and pines at Santa Barbara, and only pines and pastures at Sabana Seca.

As to the crops at Santa Barbara, the harvest of the cane was finished in the month of April, and the pines for the crop of 1910, in July. Besides the crops harvested there were also ungathered products by reason of the ratoon from cane that was cut, the number of cuerdas of plantilla cane the ratoons of which remained for the following year, and the plantation of pines that had been begun for 1912 and in part for 1911. The harvested crops did not enter into the administration account that was kept for the estate Santa Barbara and Sabana Seca; each was entered in its respective account; that of Santa Barbara in the accounts for Santa Barbara, and that of Sabana Seca in the account for Sabana Seca; in administration, the account of cane and pines.

The products were sold; the cane from January to April, which is the average; the sugar every day; the quantity of cane is delivered daily and the mills render a weekly statement of the sugar therefor.
to be sold when it is thought advisable fifteen days thereafter.
75 The last transaction on sugar was made in the month of April, and on pines in June. The said account of pine and canes did not yield any profit. I cannot state precisely how much loss there was; they yielded a loss. 11,000 boxes of pines were sold. I cannot say the quantity of sugar produced on that number of cuerdas. The average weight was 280 quintals per cuerda. About 41,000 quintals for the whole plantation.

Just now I am managing the house of Pizá Hermanos & Co. Mr. Pizá is not in Porto Rico; he has been absent since the 1st of June Ultimo. It is possible to strike a balance either in favor or against the cane account; not so of pines, because as to the pines, due to the differences that existed it has not been possible to separate last year's crop from the crop for this year, and as expenses on the plantations of pines should have ceased in January or February, except as to the harvesting, expenses for cultivations have also been charged thereon.

which could not be correctly liquidated without a separation of such expenses as can be easily separated.

After the organization of the firm of Pizá Hermanos & Co. no balance was struck at the end of each social year. We have had some years in which the balance was struck for the year, for eleven months, and lately it was two years that no balance had been struck, sometimes because the chief of the house was abroad and upon his arrival he did not want to strike a balance and the last year, the balance of 1908 was suspended because it would have been entirely contrary to the wishes of the house, and no balance was struck. Upon the striking of a balance, the profits accruing to Mr. Gandia were entered in his account, in the account of Mr. Gandia. He had but 10% that accrued to him on the profits shown by the balance. The expression used in the Inventory Book that says "Capital Account" means the one appertaining to the partners of the house.

Mr. Gandía was considered to be an employee of the house, like myself; the Capital Account appertained only to Antonio Pizá, and Francisco Pizá, who are the only partners of the house. In
76 the account of Mr. Gandía there is no Capital Account. He appeared only as an employee of the house; as an attorney-in-fact that he was of the house. There was no account of Ricardo Gandia other than that in which he was credited and charged with what he drew.

The estate Santa Barbara figures as any other account; the account of Santa Barbara which was acquired with the capital that the firm had. The firm was established with merchandise and accounts, and in the course of its business Santa Barbara was acquired with the firm's capital in November, 1902; since that date Santa Barbara appears in the assets of the house of Pizá Hermanos as any other account of merchandise or of any other business.

The Court: Before the other party begins his cross-examination I have thought over my previous decision on those two questions propounded by you. I firmly believe that I am not mistaken; I believe that I am right in sustaining the objections of the other side, but as this suit is without objections so far, and you are looking for that as a point for comparison, I am going to allow you to ask the questions; I would be sorry to see a case thrown down on that account and am going to permit the two questions.

Plaintiff: In such case, I take an exception.

Defendant: One of the questions is whether Mr. Pico was in the house, as attorney-in-fact, with interest therein on same terms as stated in the instrument of organization of the firm.

Witness: I was in the house under the conditions that Mr. Antonio Pizá told me, which were the following: from this date you will have one hundred dollars salary and 10% of the profits, and I have said that I was agreed to it. That was my statement upon informing me of those conditions, because formerly I was earning only eighty dollars salary, and upon the organization of the new firm he told me, from this moment you will have one hundred dollars and the 10%.

Questioned by the Honorable Court, the witness said: That was before the execution of the instrument; those were his words:

The defendant continues questioning, and the witness says:

That was a spontaneous action of Mr. Piza. I did not demand that he give me that 10%; it was a spontaneous act of his which I
77 accepted. After that I saw the instrument of partnership, later on, three or four months thereafter. I saw the terms in which it was drafted, and did not object at all.

DEFENDANT: My other question was: Do you know whether Mr. Gandia was in the same conditions as you, and did the same thing happen with him as with you?

WITNESS: What Mr. Pizá said to Mr. Gandia I do not know, because I was not present; he spoke to me at a certain time and afterwards to Mr. Gandía, but I was not present.

When Mr. Gandia left the house the inventory for January of last year, had been taken, but no clean copy thereof had been made. The inventory was waiting to be clean copied. The merchandise entries had been made up to the 15th or 16th of January; not so the books, because the bookkeeper was ill and there was some delay in bookkeeping and the books were not up to date.

When Mr. Gandia left the house the balance was only on a blotter as it could not be clean copies because there had been no agreement between them, and an agreement was necessary in order to close the balance and make a liquidation of the capital. The reason why the balance was not clean copied was that, while there was a disagreement between Mr. Pizá and Mr. Gandía it was not possible to make a clean copy of the same.

PLAINTIFF: Did that balance on a blotter have the entry that appears in the books?

WITNESS: No sir, it was not finished.

Mr. BALDOMERO SAN ANTONIO testifies under oath, and to questions propounded by the party defendant, answers:

My name is as aforesaid. In January of this year I was bookkeeper for the firm of Pizá Hermanos, and as such and being in charge of the accounts I intervened in the general balance, in the inventory and general balance that was made by the house in
78 the same month of January, of all transactions, so as to enter in the books everything corresponding to the balance.

In making that balance the accounts that I kept as book-keeper were suspended, at the time that there remained but the apportionment of the profits that had been liquidated and which depended on the action that would be taken by Mr. Gandía if he left the house, or the agreement that he might make, so as to state the same; the difference that arose between Pizá and Gandía stopped the accounting of the house pending their decision.

DEFENDANT: I offer as documentary evidence such documents as have been introduced by the party plaintiff, but in their entirety as I stated before. And, besides, the instrument of October 27, 1902, of the organization of the firm of Pizá Hermanos, S. en C. No. 365.

It is admitted by the Court without objection and is marked letter "A" for the defendant.

DEFENDANT: And another instrument of November 25, 1907, relative to modification of the firm of Pizá Hermanos, No. 586, of the office of the Notary, Mr. Monserrat.

It is admitted by the Court without objection by the party plaintiff and is marked under letter "B" for the defendant.

Documentary evidence for the defendant, introduced.

Document Letter "A" for the Defendant.

Instrument of organization of partnership, executed by Mr. Antonio and Mr. Francisco Piza, October 27, 1902.

(This instrument is set out in the evidence for the plaintiff, under No. 13.)

Document Letter "B" for the Defendant.

Instrument of modification of partnership executed by Mr. Antonio Piza y Mas, for himself and as attorney-in-fact for his brother, Mr. Francisco Piza y Mas, on the 25th day of November, 1907, before Mr. Damian Monserrat, Notary.

Mr. Antonio Pizá appears for himself and as attorney-in-fact for his brother Mr. Francisco, both of lawful age, etc. That under instrument of October 27, 1902, which was executed before the undersigned notary, the party hereto, Mr. Antonio Pizá for himself and as attorney-in-fact for his brother, Mr. *Antonio*, organized a commercial firm, as a special partnership, to do business in this market under the name of Pizá Hermanos, S. en C., the said Mr. Francisco having therein the character of silent partner, and Mr. Antonio, managing partner. That before the expiration of the term of five years that had been fixed as the duration thereof, the partners agreed to extend the same to ten, and in order to have the same appear of record in compliance with, etc., they covenant:

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To modify clause fifth of the said instrument of organization of partnership of October 27, 1902, by providing ten years instead of five as the term stated therein, extending the business and the operations of the said commercial firm of Pizá Hermanos, S. en C., to October 15, 1912.

They ratify, etc., etc.

Documentary evidence for the defendant admitted.

Documents No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7 that appear marked under said numbers in this statement of the case, in the evidence for the plaintiff.

Evidence in Rebuttal by the Plaintiff.

Mr. ANTONIO SARMIENTO, testifies under oath and says:

To a question by the Honorable Court, he answers: My name is Antonio Sarmiento.

The COURT: You may testify.

WITNESS: Having been retained by Mr. Gandía to take charge of this case, I addressed Mr. Pizá, of whom I am a personal friend, so as to see whether, as such personal friend of his, some way could be found for a settlemnet of their differences without my being compelled to undergo the sorrow of having to sue so dear a friend as Mr. Pizá.

Mr. Pizá then, in a letter which it is not necessary to produce, directed me to Mr. Hernandez Lopez, his lawyer, for a consideration of these matters and for the purpose I fixed a date with Mr. Hernandez Lopez and we had a conference in which each of us stated his opinion of the case. Then Mr. Hernandez Lopez made me a proposition—that Mr. Antonio Pizá appraise the estate Santa Barbara, for the purpose of the liquidation and profits, in the sum of $60,000 and give an option to Mr. Gandía for one month to sell the same for as high a price as he could and such higher price would be taken as the value of Santa Barbara, but under the condition that if there was any person who would pay more than the $60,000 for the said Santa Barbara, then Mr. Antonio Pizá, not the house of Pizá Hermanos, might keep Santa Barbara for such price; then, Mr. Pizá would reserve the right of keeping it personally; Mr. Antonio Piza would then keep Santa Barbara for himself for such higher price as he might have obtained under the option, if convenient to him; and as regards cultivations that he understood that the same were subject to such liquidation as might be made finally. On these conditions I, in turn, made a counter offer to Mr. Hernandez Lopez:—that estimating Santa Barbara to be worth $80,000 and estimating cultivations in the sum of $20,000, we might really divide the difference from 60 to 80, which is 20, and 20 for cultivation, and as 10% accruing to Mr. Grandia was $2,000 on each of the two things, I would make cession of the right that I thought was Mr. Gandia's and offer Mr. Pizá a settlement for $13,000. Under those conditions, each one of us went to communicate to his client the offers that had been made, but we were not fortunate in having the same accepted by either of them. Gandía told me that he could not accept that offer under the said conditions because it would be an eventuality to find a buyer that would pay him the true value of the estate.

80

Evidence in Rebuttal by the Defendant.

Mr. JUAN HERNANDEZ LOPEZ, under oath, and to questions propounded by the Honorable Court who permitted him to testify, said: My name is as aforesaid; Mr. Sarmiento and myself held, I believe, two or three conferences. I am agreed to all the statements made by

Mr. Sarmiento except in that when I stated that Mr. Pizá was willing to take the estate for $60,000 it was on the basis of purchasing the same for $60,000, himself; that I, on receiving for Mr. Antonio Pizá or rather for the house of Pizá Hermanos, S. en C., I mean, and Co., the right to purchase the property for a higher sum than $60,000, should a buyer be found therefor, it was because as there was another partner in the firm other than Mr. Pizá, the firm might resolve and perhaps it might have been convenient for it to
81 keep the property for a difference of two, three, four or five thousand dollars as there might be some buyer who would offer $65,000 for the property and it was a matter of foresight to provide that the house might keep the property if convenient to it.

PLAINTIFF: The reasons that have been stated before the Court, were they stated by the attorney who is addressing it? No sir; they are reasons given me by Mr. Pizá; instructions that Mr. Pizá gave me and grounds upon which I should maintain a settlement on those terms.

The evidence for both parties being all in, the case remained subject to the filing of briefs, which were filed in due time by the attorneys, and the Court rendered a judgment which is stated in the judgment roll, and from which an appeal has been taken, or rather a motion for a new trial has been made by the party defendant.

(Signed) JUAN HERNANDEZ LOPEZ,
Attorney for Defendant.

Received copy of the preceding statement of the case this third day of February, 1911.

(Signed) A. SARMIENTO,
Attorney for Plaintiff.

The foregoing statement of the case is hereby approved as it is a true and correct statement of everything that transpired at the hearing and as it contains all the evidence introduced therein, to which I certify. San Juan, February 9, 1911.

(Signed) PEDRO DE ALDREY,
Judge of the District Court, Section 1, Who was Acting as Such When this Hearing was Held.

82 We, the undersigned, attorneys for the parties in the above-named case, do hereby certify: That the foregoing transcript of the record is a true and correct copy from the original in this suit filed in the office of the Clerk of the District Court for the Judicial District of San Juan, P. R. Section 1, Case No. 3645, prosecuted by Mr. Ricardo A. Gandía, as plaintiff, against Pizá Hermanos, S. en C., as defendants, for the collection of money; and for the purpose of the appeal taken by the said *part* parties defendant from the judgment of the said Court, we issue this certificate under our hand in San Juan, Porto Rico, this thirteenth day of March, 1911.

(Signed) A. SARMIENTO,
Attorney for Plaintiff and Appellee.

(Signed) JUAN HERNANDEZ LOPEZ,
Attorney for Defendants and Appellants.

83 In the Supreme Court of Porto Rico.

683.

RICARDO A. GANDÍA CALDENTEY, Plaintiff and Respondent,
vs.
PIZÁ BROTHERS, Defendants and Appellants.

Appeal from a Judgment Rendered by the District Court of San Juan on 10th November, 1910.

Opinion of the Court, Delivered by Justice MacLeary.

SAN JUAN, PORTO RICO, *20th June*, 1911.

The plaintiff, Ricardo A. Gandía Caldentey, brought suit in the District Court of San Juan on the 31st of March, 1910, against the defendants Pizá Brothers, a commercial firm, to recover the sum of ($15,358.23) fifteen thousand three hundred and fifty-eight dollars and twenty-three cents, claimed to be due him as compensation for his services to the said firm, as employee and agent, by virtue of a contract made with said defendants on the 15th day of October, 1902; said services being rendered between the said date and the 11th of March, 1910. It is alleged, in the complaint, that the terms of the contract were that plaintiff should receive from defendants, as his compensation ($140.00) one hundred and forty dollars per month, as salary, and (10%) ten per cent. of the net profits of their business additional thereto. During the (7) seven years and more that respondent was in the employ of appellants he received large sums of money, from time to time, and on leaving their service on the date aforesaid it seems to have been tacitly admitted that there was due him a cash balance of ($7,416.70) seven thou-
84 sand four hundred and sixteen dollars and seventy cents; but the rest of the claim amounting to ($7,941.53) seven thousand nine hundred and forty-one dollars and fifty-three cents was earnestly disputed and vigorously resisted. After various proceedings a trial was finally had before the District Court of San Juan which resulted in a judgment in favor of the plaintiff for the full amount claimed. From that judgment an appeal was taken to this Court.

Respondent seeks in his brief, and did in his oral argument, to have the appeal dismist or at least considered because of formal defects, in the preparation and presentation of the transcript, and has devoted a lengthy discussion to that point. But this movement is effectually met by the appellants with a citation of Rule 62 of this Court, which provides that all matters of this kind must be presented and disposed of prior to the trial here. Thus it is that such objections come too late at the hearing and we must take up the case as it is presented in the record; and dispose of it on its merits.

In their brief the appellants complain of seven errors alleged to

have been committed by the trial court and set them out in detail as follows:

"1st. The judgment is erroneous in the consideration made by the Court of the facts establishing the terms in which the parties agreed with each other in regard to the contract made between Messrs. Gandía and Pizá.

2nd. The judgment is erroneous, both as to law and fact, in not considering Mr. Gandía as an industrial partner of the firm of Pizá Brothers and in regarding him as only an employee.

3rd. The judgment is erroneous in law and in fact in accepting the terms of the contract made between Messrs. Gandía and Pizá in the manner in which it was stated by Mr. Gandía in his testimony.

4th. But conceding that the plaintiff was only an employee of the house of Pizá Brothers and nothing more, and even accepting all the terms of the contract just as the plaintiff himself testified them to be; the judgment is erroneous in violating said contract, which is the fundamental law in the matter of this suit.

5th. The judgment is erroneous in granting profits from a business which was pending and which had not been and could not yet have been the subject of liquidation.

6th. The judgment is erroneous in granting to the plaintiff profits from the crops of canes and pines at "Santa Barbara" and "Sabana Seca"; it being the fact that said crops had caused a loss to the firm of Pizá Brothers.

7th. The judgment is erroneous in admitting as net profits the supposed profits of those fields and plantations, which did not arise from a balance struck between the expenses and the income, in order to reach a sure and certain conclusion pro and con of the true balance."

Let us now examine these several propositions in the order in which they have been presented by the appellants.

First. Then did the trial court err in the construction put upon the term of the contract made between the parties? It is said by the respondent that the appellant- fails to cite any statute or decision which has been violated or disregarded in the consideration of the facts by which the contract was establisht or in the construction put thereon. But let that pass, and we will inquire into the manner in which the judge arrived at his conclusion as to the terms of this contract. The trial court in its opinion says:

"2nd. That the compensation agreed upon between plaintiff and defendants for such service was ($140) one hundred and forty dollars per month and (10%) ten per cent of the profits on the partnership capital.'"

Counsel cites the testimony of the plaintiff to the effect that the contract was that he was to receive (10%) ten per cent. of the net profits, which were credited in his private account, the only one which he had, and that there was no account of profits to be thereafter liquidated. The error assigned seems to be that the Court omitted the word net from its summary. If this

inadvertant omission was an error it was harmless, as the net profits were the only ones taken into account when the court came to sum up the items and render the judgment. In ordinary use the term profits generally means such as arise after all incomes and disbursements are considered and is thus equivalent to net profits unless they are stated to be gross profits. No doubt such was the sense in which the trial judge used the word profits in preparing the opinion to which reference is made. If the trial judge erred in this particular it may be that he was led into the mistake by the language of the partnership contract, made by the appellants between themselves, in which it is stated that, on ceasing to be employees, the respondent and another should have paid to them that part of the profits (not net profits) to which they might be entitled. And besides this error, if it were such, appears only in the opinion of the trial court and not in the judgment. If the judgment is correct the motives on which it is founded may be wrong and still the judgment will stand, as we have frequently decided. Then the first assignment lacks merit sufficient to demand further consideration.

Second. Should the Court in its judgment have considered the respondent as an industrial partner of the appellants' firm and not merely as an employee? The appellants admit that the respondent was an employee but they claim that he was at the same time an industrial partner, and should have been treated as such in the trial of this case and the rendition of the judgment from which this appeal was taken. Let us see what the law regards an industrial partner to be. Surely he is a partner of some sort and must have that status before he can be classified as industrial, special, general or otherwise. A partnership according to our Civil Code (section 1567) is "a contract by which two or more persons bind themselves to contribute money, property or industry to a common fund with the intention of dividing the profits among themselves." To the same effect are articles 116, et seq. of the Commercial Code. And

87 when real property is contributed by one of the partners the partnership must be establisht by a public instrument. (Section 1569 of Cvil Code.) The partnership of Pizá Brothers, in this case, was formed by such an instrument. But the respondent was not a party to it; he did not agree to the making of it nor sign it, nor even see it until months after it was made and registered. How could he be a party to a written instrument of whose very existence he had no knowledge? And it is prescribed explicitly in our Civil Code (Section 1224) that contracts, for partnership as well as others, are only valid between the parties who execute them. Besides in the written contract of partnership of the appellants in the single clause where the respondent is mentioned he is termed an employee and not a partner. Then the plaintiff, not being a signer of the written instrument, was not bound by the partnership contract and was not a partner of the firm of Pizá Brothers, industrial or otherwise.

Third. Did the trial court err in accepting the version of the contract of employment given by the respondent in his testimony?

The testimony of the plaintiff (respondent here) was entitled to consideration the same as should be given to that of any other witness, making allowances of course for the fact that he was interested in the result of the suit. But the appellants contend that this testimony *dies* not accord with the allegations made in the complaint and the deadly parallel is drawn between them. In his brief counsel for appellants says that plaintiff in his complaint alleges:

3rd. That from the 15th day of October, of the year 1902, on which he was appointed as an employee by the defendant company, the petitioner has rendered his services to the aforementioned firm as such an employee up to the 11th day of the present month of March, 1910.

4th. That the compensation agreed upon for such services was ($140.00) one hundred and forty dollars, as salary per month and (10%) ten per cent. of the net profits."

Then it is urged that the respondent as a witness adds to these allegations that the (10%) ten per cent. "Of the net profits were credited to him after each balance, together with his salary in his private account, and that all those profits and his salary were then at his complete disposal, and that according to the provisions
88 of the Code the balances were to be made annually, or within a period as approximate as possible, thereto." This statement is not, in our view, contradictory to the allegations contained in the complaint, but only explanatory thereof. In the pleadings the evidence should not be set out exactly as it is to appear on the trial, but only the ultimate facts are required to be alleged. The allegations and the proof should correspond it is true; however, this agreement is not to be literal but substantial and the proof must necessarily be more elaborate than the allegations. The witness could properly state in his testimony how the salary and compensation had previously been paid in carrying out the contract and how the credits to which he was entitled had been entered on his account. The testimony was not at variance with the complaint but in harmony therewith. Moreover the testimony of the respondent is supported by other evidence contained in the record. On inspection of the five balances, which were struck by the appellants showing the condition of their business in the years 1904, 1905, 1906, 1907 and 1910, they all show that Gandía and Pico were credited with the ten per cent. of the profits claimed and that these credits were subject to their drafts. Then the trial court did not err in accepting the respondent's version of the contract as correct.

Fourth. But it is alleged as an error that the judgment is contrary to the contract made between the parties; and that the contract is the law of the case. Let us see. Of course the contract must be accepted as fixing the rights and obligations of the parties in this suit, or as it is expressed "is the law of the case." The particular matter aimed at in this assignment seems to be that under the contract the plaintiff could receive only (10%) ten per cent. of the net profits, and that he left his employment on the 11th of March and claimed his interest in the net profits up to that time on a valuation then made of the partnership capital including the plantation

"Santa Barbara"; and that the judgment erred in conceding the plaintiff (10%) ten per cent. of the difference in the value said estate on that date and the cost of the same to the firm as show by the inventory.

89 Objection is made to receiving the testimony of the expert on this matter. The value of the plantation Santa Barbara at the time the respondent left the employ of the appellants i deemed to be immaterial to the issues in this action, it being asserte that the respondent had no interest therein, but only in the crop growing thereon. It is contended that the increase in value of this landed property, belonging to the firm as a part of its capital, cannot be considered as net profits in which the plaintiff had a right to participate. It is said that this increase, this unearned increment, is the result of time and favorable economic circumstances, which have affected all landed property in this island since 1900, and especially such land as is devoted to the culture of sugar cane and pineapples. It seems to be forgotten that this estate was purchased at a low price and that the plaintiff himself as agent of the firm, made the trade, and secured the bargain. But that matter need not be taken into account.

The increased value of the real estate, was under the terms of the contract of employment, properly considered a part of the net profits. This is also shown by the fact that in the balances struck in the years 1904, 1905 and 1906 this increase was considered as net profits and the plaintiff was credited with (10%) ten per cent thereof as a part of his compensation. He drew from time to time his salary of ($140.00) one hundred and forty dollars per month, and besides more than ($5,000.00) five thousand dollars on account of the net profits of which this increased value of the real estate formed a part. In the same way in the balances struck in 1907 and 1910 the plaintiff is set down as a creditor of the firm in the sums of ($9,450.33) nine thousand four hundred and fifty dollars and thirty-three — and ($7,789.57) seven thousand seven hundred and eighty-nine dollars and fifty-seven cents respectively. In these sums this increase in the value of Santa Barbara is included to make up the respectable amounts stated. And in the business of such a firm as that of the appellants, conducting various mercantile establishments, sugar plantations and pine apple farms, and dealing in real estate, all sources of profit are properly included in the balance sheet when estimating the net profits derived from the busi-

90 ness.

Then the fourth assignment is not well founded.

Fifth. Was it an error in the judgment to give the respondent credit for profits derived from the appellant's business which was still pending at the date when the suit was begun and could not then have been the subject of liquidation? In support of an affirmative answer to this proposition the Counsel for appellants cited Article 225 of the Commercial Code. This article has reference to a partner retiring from the firm and has nothing to say about employees; then if the plaintiff was an employee and not a partner the article quoted has no application. An employee can retire when-

ever he chooses, so that he does not violate the contract by which he came to be employed. And this article of the Commercial Code cannot be applied by analogy to the case of employees or an attorney in fact, since the circumstances, rights and obligations existing between them and the firm are entirely different from those which surround and appertain to the partners among themselves. This assignment when properly construed really turns on the meaning given to the words net profits. According to the view taken by the trial court, in which we concur, these could be ascertained at any given date and the respondent could justly claim to have his compensation fixt on the basis of the net profits as they stood on the 11th of March, 1910, the date when he left the employment of appellant's firm. One slight circumstance corroborates the general current of testimony which justifies the view contended for by the respondent. It may be mentioned. In striking the balance in 1904 the appellants include in it as a part of the cash assets 22,000 quintals of cane which was yet to be ground. The construction which the respondent now contends for, and which was adopted by the trial court, was the same which the appellants voluntarily assumed seven years ago. The employee Gandía had no right to participate in any gains arising after the date of his resignation nor was he liable to have his compensation reduced by subsequent losses. The business of the firm went on as usual after the retirement of this employee and neither he nor the firm was affected by it in any way whatever. Hence this assignment is not well taken.

91 Sixth. Was the respondent entitled to profits from the crops of canes and pines on the two plantations Santa Barbara and Sabana Seca; supposing the firm to have sustained a loss on the said crops? The same reasoning applied to the last proposition applies also to this. The balance was correctly struck on the 11th of March, 1910, and the value of the crops, on that date, was the sum on which the (10%) ten per cent coming to the respondent was to be calculated. Any gains or losses occurring thereafter concerned the appellants alone and the respondent had no participation therein. All testimony in regard thereto, that of Pico among the rest, was irrelevant and it matters not what it showed. It was properly admitted, since the plaintiff at the trial made no objection thereto, but the trial court correctly disregarded it in making up the decision of this case. Suppose the prices of sugar and fruit had in the meantime, between the 11th of March and the 6th of September, the dates of the discharge of respondent from the appellant's service and the trial of the cause, doubled or trebled, the increased profits would have inured solely to the benefit of the firm and the employee would have had no right to participate therein. So in case another tornado had swept over this island, on the 8th of August, and entirely destroyed the crops on the plantations mentioned, the appellants alone would have had to bear the loss and it could not have affected the rights of the respondent. His compensation is fixt by a valuation of the property made at the date of his discharge and not at any date subsequent thereto. The testimony of the experts in regard to the value of the crops at Santa

Barbara and Sabana Seca, was perfectly competent and was properly admitted. Besides no objection was made thereto on the trial, and it is too late to make them in this court. Then it is unnecessary to follow the lengthy and ingenious argument of the appellants' counsel in regard to the proper construction to be put upon the law of evidence and the other statutes relating to this question, as it is based entirely on what we consider an erroneous view of the fundamental matter involved herein.

Seventh. Then finally did the trial court err in admitting
92 as net profits the estimated products from the crops which had not yet been gathered and from which the expenses and the income were as yet unknown, as is substantially stated in the seventh assignment of error? In making this plain counsel for appellants clings to the theory that the employee, in analogy to a retiring partner, must await the final outcome of all business ventures, the raising of crops among the rest, before his share in the net profits can be ascertained. But we may repeat that this analogy does not hold between partners and employees. As we have heretofore stated, on the severance of the relations between this firm and its employee, the actual cash value of his interest in the business as it stood, on the date of his resignation, should have been correctly ascertained, and his compensation fixt accordingly and paid to him in cash then and there. This was the contract as the facts produced in the record show; and we must, as insisted on by the distinguisht counsel for appellants, accept the contract of employment as the law of this case and decide it accordingly. The court below did so, as we understand the matter, and its judgment was correct.

But to resume, this whole case really turns on three points of disagreement between the parties which are or may be stated as follows:

First. In what form has the respondent to receive the (10%) ten per cent of the profits; he affirms that he ought to receive the same in cash while the appellants allege that he ought to receive them proportionately in cash, merchandise, bills and other property of the partnership in accordance with the clause inserted in the deed of partnership of Pizá Brothers.

Second. As to the valuation of the plantation Santa Barbara which the respondent estimates at ($80,000.00) eighty thousand dollars and the appellants at ($60,000.00) sixty thousand dollars.

Third. As to the valuation of the profits yielded by the plantations of Santa Barbara and Sábana Seca which were estimated by the respondent at ($20,000.00) twenty thousand dollars, and which according to the appellants had no value whatever on the date on which the action was brought.

In order to decide the first point of disagreement between the parties to this suit we must state that it does not appear to
93 have been proven by the evidence introduced that the respondent Gandia was a special partner of the firm of Pizá Brothers but on the contrary, he had no such character, and that he was simply an employee, and attorney in fact of the firm, with a fixed salary of ($140.00) one hundred and forty dollars per month

and a compensation of (10%) ten per cent of the net profits of the same in addition thereto.

In the written contract of partnership introduced as evidence in this case Gandia has no standing as a partner of the firm; according to the aforementioned contract he made no obligation to devote his activities to the partnership referred to; but on the contrary it appears from the aforesaid written instrument that he had no other capacity than that of an employee and attorney in fact.

And it is admitted, in his brief and argument, by the distinguisht counsel for appellants, that plaintiff was an employee of the defendants, but he claims that he was also an "industrial partner" by force of the statute law on that subject. In making this claim counsel overlooks the provisions of Section 1224 of the Civil Code which settles the question adversely to appellants.

This point having been settled, let us now see in what form the (10%) ten per cent of the net profits belonging to Mr. Gandia by virtue of his verbal contract with Antonio Pizá, the only managing partner of the defendant mercantile firm, ought to be liquidated.

From the testimony of the witnesses we arrive at the conclusion that the only agreement existing between the respondent and Antonio Pizá was that the former was to receive as full compensation for his services rendered to the said firm ($140.00) one hundred and forty dollars per month, and, besides, (10%) ten per cent of the net profits; and that there was no proposal nor agreement made with the aforesaid Ricardo Gandia to the effect that the profits were to be distributed in the manner alleged by the appellants, which is the same set forth in one of the clauses of the deed of partnership of Pizá Brothers the mercantile firm.

94 The statements contained in the deed with regard to this point cannot prejudice Gandí because, as far as the evidence discloses, he did not accept the same nor did he agree to them in any form nor did he make any agreement in any form whatever with the defendant partnership in regard to this matter; and both the parties must abide by the verbal contract made by them, which did not determine the form of payment of the (10) ten per cent in the manner stated in the deed of partnership. That the contract relating to the services of Gandía which was made between the latter and the defendant firm, was in the form stated by the respondents is further corroborated by the fact that in the balances struck by the defendant firm, in the years 1904, 1905, and 1906, after the date of the deed of partnership which contained the clause referred to, the aforesaid firm has credited to the account of Gandía the (10%) ten per cent, as his share, of the profits; and that during said time he has not only disposed of his entire salary, but also of more than ($5,000.00) five thousand dollars due to him as the amount of the said (10%) ten per cent, derived from the net profits of the business. This was invariably available to the plaintiff in cash whenever he chose to draw the same from the coffers of his employers.

It is true that in the last two balances struck during the years 1907 and 1910, the defendant firm follows a different system; but said firm shows by the new system that the share of the profits, which in

said balances belonged to the respondents, received from them th same consideration as before. In the previous balances the name o the respondent figured among the creditors of Pizá Brothers; but o distributing the capital of the firm in 1907 and 1910 said firm distri buted to the respondent ($9,450.33) nine thousand four hundred and fifty dollars and thirty-three cents in the year 1907, and ($7,789.87) seven thousand seven hundred and eighty-nine dollars and eighty-seven cents in 1910, which sums are, not the amounts of the unliquidated profits belonging to the respondent up to said years, but the balances of the account current of Gandía at the date of each of those balances; and in which account current the share of the profits belonging to the respondent in each balance figured
95 as cash of his own. This is the answer which the appellants at those dates give to the question under discussion. As a result of the aforesaid facts, we arrive at the conclusion that Ricardo Gandía is entitled to his profits, not in the form alleged by the appellants, that is, to be paid proportionately in all kinds of properties, but as net profits to be placed to his credit and paid to him in cash after the balances have been properly made.

The first point in controversy having thus been thoroly considered and decided, let us now proceed to the second. The appellants acknowledge, in the ninth item of their answer made as defendants in the suit, that the account current of the plaintiff shows a balance in his favor of ($7,460.70) seven thousand four hundred and sixty dollars and seventy cents. The appellants also acknowledge in the fifth item of their said answer, that for the purposes of the balance made in connection with the liquidation which took place on account of the termination of the contract of the respondent, the value of the plantation Santa Barbara was fixt at ($60,000.00) sixty thousand dollars, and since there had been an inventory and balance on the 15th of January 1910 it was accepted by both parties, in all its parts, excepting the valuation of Santa Barbara and the valuation of the profits derived from the crops of said plantation, and the former is set down with the value of ($20,584.67) twenty thousand five hundred and eighty-four dollars and sixty-seven cents. It is thus clear that the appellants acknowledge that the plantation Santa Barbara ought to figure in the balance of liquidation with an increase of its value representing the difference between the value given to the said plantation by the appellants, which is ($60,000.00) sixty thousand dollars and the value of ($20,584.67) twenty thousand five hundred and eighty-four dollars and sixty seven cents, that is to say ($39,415.33) thirty-nine thousand four hundred and fifteen dollars and thirty-three cents, of which amount (10%) ten per cent, of this ($3,941.53) three thousand nine hundred and forty-
one dollars and fifty-three cents belonged to the plaintiff.
96 Consequently, the appellants have thus admitted that they owe to the respondent:

a. The balance of account current	$7,416.70
b. Ten per cent of the difference in the value of Santa Barbara	3,941.53
Making a total of	$11,358.23

Then the discussion, at this point arrives at the question, whether the value of the plantation Santa Barbara is ($60,000.00) sixty thousand dollars as stated by the appellants, or ($80,000.00) eighty thousand dollars as is maintained by the respondent and whether the profits and crops of Santa Bárbara and Sabana Seca were worth ($20,000.00) twenty thousand dollars at the time when the employment of the respondent terminated or if no liquidation of the same can be made up to that time, at the date of the trial; and consequently no credit should be given to respondent therefor.

In the inventory of 1902 of the stock belonging to the company or firm Pizá Brothers the plantation Santa Bárbara does not figure as part of the capital of said firm, because the acquisition of said plantation took place later on and was one of the many transactions to which the aforesaid firm devoted itself, in the regular pursuit of its business.

This is also proven by the testimony of Servando Pico, a witness for the defendants, who testified that said plantation figures among the accounts of the firm the same as any other account; that it was acquired with the capital of the firm during the course of their transactions in November 1902.

That the plantation Santa Bárbara was worth more than ($60,000.00) sixty thousand dollars on the date on which the plaintiff ceased to be an employee of the defendant partnership is clearly shown by the evidence introduced at the trial.

In the balance struck on the 31st of December, 1907, it is expressly stated that the net capital of the firm, which on said date amounted to ($149,623.67) one hundred and forty-nine thousand, six hundred and twenty-three dollars and sixty-seven cents, should really be estimated to be ($49,967.20) forty-nine thousand, nine hundred and sixty-seven dollars and twenty cents more than that amount, because the plantation Santa Bárbara was figured
97 at a value of ($20,032.80) twenty thousand thirty-two dollars and eighty cents, while the value of the same on the said date, that is, on the 31st of December, 1907, was actually ($70,000.00) seventy thousand dollars, on account of the crops existing on the same.

In regard to the inventory, we must point out that, altho it appears from the copies furnished to the respondent, by the appellants, that in the entry above mentioned it was made to appear that the aforesaid value was given to said plantation "for the amount of the assets of the firm," it has been sufficiently shown to us by the evidence that when the balance was ready the aforesaid words "for the amount of the assets of the firm," did not exist therein; and by preponderance of the evidence it was also shown to us that when Ricardo Gandía ceased to be an employee of the mercantile partnership of Pizá Brothers, on the 11th of March, 1910, those words had not been written and that they were written later on.

In view of this conclusion, we are of the opinion that the amount of ($70,000.00) seventy thousand dollars was stated as the value of the aforesaid property, not, "for the amount of the assets of the firm," but simply because it was the value at which the said planta-

tion was estimated by the appellant partnership, for any legitimat purpose whatever. But even supposing that the aforesaid amoun had been stated "for the amount of the assets of the firm," we can not believe that the appellants would have entered in their books greater value than the real one to the prejudice of their connections and to create a fictitious credit. After what has been said it must be admitted that the plantation Santa Bárbara must be worth at least ($70,000.00) seventy thousand dollars; in the first place because said firm admitted in the answer to the complaint that the value of said plantation was ($60,000.00) sixty thousand dollars; and secondly because in their own account as appears on their books the amount of ($70,000.00) seventy thousand dollars, is fixt as the value of that property.

But in consequence of the evidence introduced by the plaintiff, we are of the opinion that the plantation has been shown to possibly have even a greater value than the amount above mentioned,
98 and that it may be considered to be worth more than the ($80,000.00) eighty thousand dollars at which it was estimated by the respondent. The testimony which in regard to this point was given by the witnesses introduced, leaves no doubt in our minds concerning this statement to wit: that the plantation Santa Bárbara on the 11th of March of the year 1910 had a market value of ($80,000.00) eighty thousand dollars and of even more than that amount.

Then, if one makes with the sum of ($80,000.00) eighty thousand dollars the same operation that was made with the ($60,000.00) sixty thousand dollars, at which amount the defendant firm estimated the plantation referred to, we arrive at the following results:

a. Balance of the account current of Mr. Gandía.....	$7,416.70
b. Difference between ($80,000.00) eighty thousand dollars and ($20,584.67) twenty thousand five hundred and eighty-four dollars and sixty-seven cents with which the plantation Santa Bárbara previously appeared, amounting to ($59,415.33) fifty-nine thousand four hundred and fifteen dollars and thirty-three cents; (10%) ten per cent of which is	5,941.53
Making a total of	$13,358.23

Having thus disposed of two of the items of disagreement between the parties to the controversy before us we must finally consider the third and only remaining one.

Then there is only lacking the item of ($2,000.00) two thousand dollars, to make up the full quota of what the respondent as plaintiff claimed in his complaint and the amount which was awarded to him in the judgment. How shall we dispose of this item. Let us see.

When Ricardo Gandía on the 11th of March, 1910 ceased to be an employee of the appellants' firm the latter had under cultivation

a large portion of the plantation of Santa Bárbara, which was planted in sugar cane and pineapples, and another tract of land situate in Sabana Seca, which was planted in pineapples only, and the question now under discussion is whether these sugar cane and pineapple fields should be appraised and their value liquidated on the date above mentioned, or whether such appraisement or
99 liquidation ought to remain pending until the crops should have been gathered in order then to distribute the profits that might be due to each party having a right in the distribution.

Inasmuch as Ricardo Gandía was only an employee and attorney in fact of the firm Pizá Brothers, his compensation ought to have ceased, and in fact did cease, on the termination of the duties which he discharged in the business of said firm; and for that reason the value of the aforesaid cane and pineapple fields should have been liquidated at that time in order to ascertain the amount of the (10%) ten per cent of the value of the same to which he was entitled; and considering that the said mercantile firm was disposed to liquidate, on the 11th of March, 1910, the entire business of the partnership, and even the increase in the value of the plantation Santa Bárbara, in regard to which there was only a disagreement as to the value of the same, we cannot understand why the same thing should not be done with the cane and pineapple fields which undoubtedly had some value, on the date referred to, be it ever so small.

The respondent is not obliged to suffer losses that may have been sustained in connection with the fields above mentioned subsequent to the date on which he ceased to be an employee of the mercantile firm, in case such losses may have really been sustained, nor is he entitled, either to a compensation of (10%) ten per cent of the net profits realized after the date on which his employment by the firm ceased, and which profits might have been realized in consequence of expenses incurred and cares and labor bestowed by the mercantile partnership on the cane and pineapple fields mentioned. Hence the value of the latter must be liquidated and ascertained as it existed on the date of the termination of his employment.

We hold therefore that the cane and pineapple fields should have been appraised and valued on the 11th of March 1910 in order to adjudge the share of (10%) ten per cent of the value of the same to the employee who ceased to be in the employ of the firm and who was under his contract of employment entitled thereto in cash at that date.

According to the evidence heard by the trial court and sent
100 up in the record there existed on the plantation Santa Bárbara on the 11th of March about (115) one hundred and fifteen acres planted in sugar cane slips and some (20) twenty acres covered by sugar cane stumps and besides (80) eighty acres of pineapples; while at Sabana Seca there was another tract of land of (30) thirty acres which were likewise planted in pineapples.

The expert evidence heard by the court has shown that the net value of the aforesaid sugar cane on the 11th of March must have been ($10,530.00) ten thousand five hundred and thirty dollars

and that of the (110) one hundred and ten acres of pineapples, (44,000.00) forty-four thousand dollars, the aggregate amount of which, to wit: ($50,530.00) fifty thousand five hundred and thirty dollars represents a valuation which is more than twice as great as that of ($20,000.00) twenty thousand dollars, at which said value was estimated by the respondent in his pleadings and his own testimony.

However, since the respondent limited his demand in his complaint to (10%) ten per cent on ($20,000.00) twenty thousand dollars, we must add only the amount of said (10%) ten per cent which is ($2,000.00) two thousand dollars to the sum of ($13,358.23) thirteen thousand three hundred and fifty-eight dollars and twenty-three cents above stated and thus we reach a grand total of ($15,358.23) fifteen thousand three hundred and fifty-eight dollars and twenty-three cents, which is the same amount that is claimed in the complaint, on which this action is founded, and the sum total awarded in the judgment from which this appeal is taken and which the appellant mercantile firm Pizá Brothers, accordingly owes to Ricardo A. Gandía, the respondent.

Believing that the reasoning of the trial judge, in his opinion contained in the record, as well as the judgment rendered in this case was correct, and well founded in the law and the facts, we hold that it should be in all things affirmed.

(Signed)

J. H. McLEARY.

101 In the Supreme Court of Porto Rico.

No. 683.

RICARDO GANDÍA CALDENTEY, Plaintiff and Respondent,
vs.
PIZÁ BROTHERS, Defendants and Appellants.

Appeal from a Judgment Rendered by the District Court of San Juan, Section 1.

Judgment.

SAN JUAN, PORTO RICO, *June* 20, 1911.

This Court has carefully considered the transcript of the record filed for the purpose of the appeal brought in the above entitled case, and has duly considered the allegations of the parties, in support of their respective claims; and on the grounds stated in the opinion of the Court hereto attached it resolves to affirm and does affirm hereby, in all its parts, the judgment rendered by the District Court of San Juan, Section 1, on the 10th day of November, 1910. Notification hereof shall be duly made.

We so pronounce, command and sign.

JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.

I, José Hernandez Usera, attorney at law and secretary of the Supreme Court of Porto Rico, Do hereby certify that the foregoing opinion and judgment are true copies from the originals thereof; and to be attached to the record of the case I.issue this in San Juan, Porto Rico, on the sixth day of July, nineteen hundred and eleven.

(Signed) J. HERNANDEZ USERA,
Secretary of the Supreme Court.

102 In the Supreme Court of Porto Rico.

No. 683.

RICARDO GANDÍA CALDENTEY, Plaintiff.
vs.
PIZÁ HERMANOS, S. EN C., Defendants.

Collection of $15,358.23 and Interest Thereon.

On Appeal.

Now come the defendants and appellants before this Honorable Court, through their attorney Juan Hernandez Lopez; and as it may be best in accordance with law, state:

That they are aggrieved by the final judgment rendered by this Honorable Court under date of the 20th instant, affirming the judgment rendered by the District Court of San Juan, Section 1, which was the object of the appeal taken to this Honorable Court; forasmuch as they consider the said judgment, be it said with all due respect, onerous and prejudicial to the rights and interests of these petitioners, and therefore they take an appeal therefrom to the Supreme Court of the United States and pray that the said appeal may be admitted and that such bond as may be deemed fair may be fixed by this Honorable Court for the purposes of the said appeal.

And the said defendants and appellants further pray that pending the prosecution of the said appeal in the Supreme Court of the United States, the judgment appealed from be stayed, for which purpose these petitioners are willing to furnish such a fair and reasonable bond as may be fixed by this Honorable Court.

And the said defendants and appellants further pray that, as this Court is about to adjourn during vacation, one of the Associate Justices thereof may be commissioned for the purpose of approving, at the proper time, the statement of facts in the form of a special verdict, which said statement of facts should be submitted by these petitioners for the purposes of the said appeal, pursuant to the statutory provisions for such purposes made and provided.

103 San Juan, Porto Rico, June 21, 1911.

(Signed) JUAN HERNANDEZ LOPEZ,
Attorney for Defendants and Appellants.

104 In the Supreme Court of Porto Rico.

No. 683.

RICARDO A. GANDÍA CALDENTEY, Plaintiff and Respondent,
vs.
PIZÁ HERMANOS, S. EN C., Defendants and Appellants.

Appeal from a Judgment of the District Court of San Juan, Section 1.

Order.

SAN JUAN, PORTO RICO, *June* 22, 1911.

The appeal taken by Mr. Juan Hernandez Lopez, attorney for Pizá Hermanos, to the Supreme Court of the United States from a judgment rendered by this Court on the 20th day of June, 1911, in the above-entitled cause, is hereby admitted and a stay of execution of the judgment rendered in said cause is hereby granted subject to a bond to be furnished by the said appellant within the term provided by law and for the sum of $25,000, to answer for such damages and costs as may be occasioned to the respondent by virtue of the said stay and appeal; said bond to be approved by the Honorable the Chief Justice of this Court or any of the Associate Justices thereof; and it is hereby ordered that the said appellant shall submit for the approval of this court a draft of the statement of facts in the form of a special verdict, pursuant to the statutory provisions on that behalf, and the term of sixty days is hereby granted for the preparation of the record for transmittal to the Supreme Court of the United States.

It was so ordered and signed by the members of the Supreme Court.

(Signed) JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
EMILIO DEL TORO.

105 In the Supreme Court of Porto Rico.

No. —.

RICARDO A. GANDÍA CALDENTEY, Petitioner and Appellee, now Appellee,
vs.
PIZÁ HERMANOS, S. EN C., Opponent and Appellant, now Appellant.

Bond on Appeal.

Know all men by these presents that we, Pizá Hermanos S. en C., as principal, and Antonio Caubet and Luís Rubert as sureties, are held and firmly bound unto Ricardo A. Gandía Caldentey in the

sum of Twenty five Thousand dollars, and we bind ourselves and each of us, our heirs, executors and administrators, jointly and severally thereto firmly these presents.

Sealed with our seals and dated the 31st day of July, 1911.

Whereas, the appellant in the above entitled cause has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Supreme Court of the Island of Porto Rico, and a citation directed to said appellee is about to be issued directing him to be and appear at the next term of the Supreme Court of the United States to be holden at Washington, D. C., now, the condition of the above obligation is that if Pizá Hermanos, S. en C., the appellant, shall prosecute said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the said Pizá Hermanos S. en C. and Antonio Caubet and Luis Rubert hereby set their hands and seals the day and year above written.

(Signed) PIZÁ HERMANOS, S. EN C.,
(Signed) By SERVANDO PICO.
(Signed) ANTO. CAUBET.
(Signed) LUIS RUBERT.

106 *Affidavit No. —.*

UNITED STATES OF AMERICA.
Island of Porto Rico, City of San Juan, ss:

Antonio Caubet and Luis Rubert, after having been first duly sworn by me, each for himself, according to law, say: that they are residents and freeholders of the Island of Porto Rico and that each of them is worth the sum of twenty-five thousand dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

(Signed.) ANTO. CAUBET.
(Signed.) LUIS RUBERT.

Number 598.

Subscribed and sworn to before me on this the 31st day of July, 1911, by Antonio Caubet and Luis Rubert, residents of San Juan, Porto Rico, of age, and to me personally known.

(Signed) GABRIEL GUERRA,
[SEAL OF NOTARY.] *Notary Public in and for the Island of Porto Rico.*

The foregoing bond is approved as to form, amount and sufficiency of sureties on this the fifth day of August, A. D. 1911.

(Signed) J. H. McLEARY,
Associate Justice of the Supreme Court of Porto Rico.

107 In the Supreme Court of Porto Rico.

No. 683.

RICARDO A. GANDÍA CALDENTEY, Plaintiff and Respondent,
vs.
PIZÁ HERMANOS, S. EN C., Defendants and Appellants.

Appeal from a Judgment Rendered by the Ditsrict Court of San Juan, Section 1.

Order Approving Bond.

SAN JUAN, PORTO RICO, *August* 5, 1911.

The bond filed by the appellants on the second of August of the current year is hereby approved as to form, amount and sufficiency of sureties for the purposes of the appeal taken to the Supreme Court of the United States. It was so ordered by the Honorable J. H. MacLeary, Associate Justice of the Supreme Court, under his rubric, to which I certify.

(Signed) J. HERNANDEZ USERA, *Secretary.*

108 In the Supreme Court of Porto Rico.

No. 683.

RICARDO A. GANDIA CALDENTEY, Plaintiff and Appellee,
vs.
PIZÁ HERMANOS, S. EN C., Defendants and Appellants.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to Ricardo A. Gandía Caldentey, plaintiff and appellee, and to Antonio Sarmiento, his attorney:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C. within sixty days from the date of this writ, pursuant to an appeal filed in the office of the Secretary and Reporter of the Supreme Court of Porto Rico, in a certain cause lately pending in said Court, wherein Pizá Hermanos, S. en C. are defendants and appellants, and you are plaintiff and appellee, to show cause, if any there be, why the judgment rendered therein against the said defendants and appellants should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James H. MacLeary, Associate Justice of the Supreme Court of Porto Rico, at the City of San Juan, P. R., this

8th day of August, in the year of our Lord, one thousand nine hundred and eleven.

(Signed) J. H. MacLEARY,
Associate Justice of the Supreme Court of Porto Rico.

Attest:

(Signed) J. HERNANDEZ USERA,
Secretary and Reporter of the Supreme Court of Porto Rico.

109 A. Sarmiento.

Received this writ this 8th day of August, 1911, and served the same by delivering a true copy thereof to A. Sarmiento, the attorney of record.

This at San Juan, P. R. this 8th day of Aug. 1911.

(Signed) S. C. BOTHWELL, *Marshal.*

110 [Endorsed:] Filed in my Office with 2 copies, on this 28 day of September, 1911. J. Hernandez Usera, Secretary of the Supreme Court of Porto Rico.

111 In the Supreme Court of Porto Rico.

No. —.

RICARDO A. GANDIA CALDENTAY, Plaintiff and Appellee,
vs.
PIZÁ HERMANOS, S. en C., Defendants and Appellants.

For Liquidation of Profits and for Collection of $15,358.23, Interest and Costs.

On Appeal.

Now comes the firm, defendant and appellant herein, before this Honorable Court, through its attorney, Juan Hernandez Lopez, and for the purpose of complying with the rules of the Honorable the Supreme Court of the United States, and in support and as a complement of the appeal taken to said Court from the judgment rendered by this Honorable Court, submits the following:

Assignment of Errors.

I.

That the judgment appealed from, rendered by this Honorable Court, is erroneous in law in finding and holding that the greater value or the increased value of the estate Santa Barbara, due to the action of time and circumstances, over and above the price of acqui-

sition or purchase price, should be considered as a net profit on which the plaintiff is entitled to receive ten per cent as a participant in the profits of Piza Hermanos, S. en C.

II.

The said judgment is likewise erroneous in law in establishing the terms in which the parties are agreed as to the contract made between Messrs. Gandia, plaintiff, and Piza Hermanos, S. en C., defendants.

III.

The said judgment is also erroneous, in law, in finding and holding that the plaintiff, Mr. Gandia, was only an employee and
112 not an industrial partner at the same time of the firm of Piza Hermanos, S. en C., pursuant to Section 288 of the Code of Commerce of Porto Rico.

IV.

It is likewise erroneous in law in accepting the terms of the contract entered into and between the said Mr. Gandia, plaintiff, and Piza Hermanos, defendants, in the manner in which it was stated by Mr. Gandia in his testimony.

V.

It is likewise erroneous in law, in finding and holding that the said plaintiff, when leaving the commercial firm of the defendants, was not bound to wait until the termination, in the manner most convenient to the common interests of all, of the results to be had from the fields and plantations then pending, and that until such things should happen no profits should be liquidated and no part thereof delivered to the said plaintiff, pursuant to Section 225 of the Code of Commerce of Porto Rico.

VI.

It is likewise erroneous in law and in contravention of the fundamental law of the case, namely, of the contract entered into and between the plaintiff and defendants, in finding and holding that the greater value of the estate Santa Barbara, through the action of time and circumstances, over and above the original purchase price, is a net profit coming under the said contract entered into between the said plaintiff and the said defendant firm.

VII.

Further, it is erroneous in law in granting to the plaintiff net profits on fields and plantations which was a business then pending at the time that the plaintiff, Mr. Gandia, left the commercial firm, defendant herein, and which had not been and could not yet have been the subject of liquidation.

VIII.

Further, it is erroneous in law in granting to the plaintiff net profits on plantings of canes and pines at Santa Barbara and
113 Sabana Seca which, when harvested, yielded losses to the defendant firm of Piza Hermanos.

IX.

Further, it is erroneous in law in admitting as net profits, profits on the aforesaid fields and plantations where such profits do not result from a balance of expenses and income, in order to reach a sure and certain conclusion pro and con of a true balance.

X.

And, lastly, the Court errs in finding and holding that a determination may be made of the net profits on the aforesaid fields and plantations, claimed by the said plaintiff, on the strength of the evidence introduced by the said plaintiff, without the necessity of taking into consideration or estimating the expenses and disbursements occasioned by the said fields and plantations, as shown by the books of account and the commercial books of the said defendant firm.

San Juan, Porto Rico, June 26, 1911.

(Signed) JUAN HERNANDEZ LOPEZ,
Attorney for Defendants and Appellants.

114 In the Supreme Court of Porto Rico.

No. 683.

RICARDO A. GANDIA CALDENTAY, Plaintiff and Appellee,
vs.
PIZA HERMANOS, S. EN C., Defendants and Appellants.

Collection of Money.

On this the 19th day of October, 1911, this Court, on petition of the aforesaid defendants and appellants, certify the following as a statement of the facts proven, by way of a special verdict, for transmittal to the Supreme Court of the United States, as a part of the record in said suit on appeal to the aforesaid court, as provided by the Act of Congress of April 7, 1874.

I.

That under public instrument dated October 27, 1902, executed before a Notary Public, there was organized in this City of San Juan the mercantile firm of Piza Hermanos by Don Antonio Piza y Mas, as party of the first part, and by Don Francisco of the same surname,

as party of the second part, to do business under the name of Piza Hermanos, S. en C., the said Don Francisco having the character of a special or silent partner, and the said Don Antonio of managing partner.

II.

That the said firm of Piza Hermanos, S. en C. was organized as a successor of the former commercial firm known as Piza Hermanos.

III.

That the plaintiff and appellee, Ricardo Gandia Caldentay, was an old employee of the said former house of Piza Hermanos, of which he had been, for about seventeen years, first a clerk, then correspondent, and later book-keeper and lastly attorney in fact for the same firm of Piza Hermanos.

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IV.

That upon the organization of the new firm of Piza Hermanos, S. en C. the said Ricardo Gandia, plaintiff herein, agreed with the managing partner of the said firm, Mr. Antonio Piza, to be general attorney in fact for the said firm with a monthly salary of One hundred and forty dollars, and besides, ten per cent of the net profits, which was to be credited in his private account.

V.

That the said plaintiff, Ricardo A. Gandia Caldentay, discharged his commission as attorney in fact for the said firm of Piza Hermanos, S. en C., from October 15, 1902, to March 11, 1910, on which day he left the firm of his own will and for his own convenience.

VI.

That punctually during all that time the said plaintiff was credited in his private account, the only one he had with the firm, by the defendant firm, with his salaries agreed to and the ten per cent of the net profits, under each balance struck prior to January 15, 1910, by the said firm, and against which account the said Gandia drew such money as he desired.

VII.

That on January 15, 1910, the said defendant firm struck a last general balance of the house which showed a net profit of ($18,097.81) eighteen thousand and ninety-seven dollars and eighty-one cents.

VIII.

That on leaving the defendant firm the said plaintiff, Ricardo Gandia, on the 11th day of March, 1910, demanded from the said firm a liquidation of the profits up to the day of his leaving, after

making a true valuation of the property of the firm so as to finally deduct the ten per cent accruing to the petitioner on the profits thereunder; making a summary of his claim and stating same specifically in the manner following:

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By balance in his favor in the account current for salaries and profits under general balances prior to January 15, ultimo	$5,606.92
By part of the profits in the general balance of January 15, 1910	1,809.78
By difference in the valuation of the estate Santa Barbara	5,941.53
By difference in valuation of cultivation and planting at Santa Barbara and Sabana Seca	2,000.00
Total	$15,358.23

IX.

That the estate Santa Barbara is a rural property that was acquired by the defendant firm, a few days after the organization thereof, for the sum of twelve thousand dollars, and that later on improvements were made therein increasing its cost to Twenty thousand five hundred and eighty-four dollars and sixty-seven cents, for which sum it appears in the said balance of January 15, 1910.

X.

That on the introduction of evidence at the trial of the suit the witnesses, agriculturists, introduced by the party plaintiff, testified that the present value of the said estate, that is to say, the value of the lands thereof, is Eighty thousand dollars, and even more than that amount.

XI.

That on the relinquishment of his commission as attorney in fact for the defendant firm, by the said plaintiff, on the 11th day of March, 1910, there were on the said estate Santa Barbara and Sabana Seca certain plantations of canes and pines which were harvested and ground thereafter, in the months of April and June of the same year.

On March 11, 1910, there was on the estate Santa Barbara about one hundred and fifteen cuerdas of land planted in plantilla cane and about twenty cuerdas of ratoon cane, and besides eighty cuerdas of pines, while there was at Sabana Seca another parcel of thirty cuerdas of land planted in pines. The net value of the said sugar cane on March 11, 1910, must have been Ten thousand five
117 hundred and thirty dollars (10,530) and that of the 110 cuerdas of pines Forty-four thousand dollars (44,000) according to the testimony of the experts.

XII.

On the grounds hereinbefore stated, the said plaintiff filed his complaint praying the District Court to render judgment adjudging and decreeing that the said plaintiff do have and recover from the said Piza Hermanos, S. en C., the sum of Fifteen thousand three hundred and fifty-eight dollars and twenty-three cents, and legal interest thereon from and after the filing of said suit, and costs.

XIII.

The defendant firm, in answering the complaint, denied that part thereof relative to the valuation of the estate Santa Barbara and as regards the payment of the profits on plantings and plantations hereinabove mentioned, before the crops thereof were harvested and sold, and prayed the Court to dismiss the complaint with costs taxed against the plaintiff.

XIV.

A trial was held, evidence was introduced by each of the parties and admitted, and the District Court of San Juan rendered a judgment in favor of the party plaintiff. The defendant took an appeal from the aforesaid judgment to this Supreme Court, and in the said appeal, the aforesaid defendant and appellant alleged and specified, to be submitted for the consideration and decision of this Court, the following errors:

1st. The judgment is erroneous in the consideration made by the Court of the facts establishing the term in which the parties agreed with each other in regard to the contract made between Messrs. Gandia and Pizá.

2nd. The judgment is erroneous, both as to law and fact, in not considering Mr. Gandia as an industrial partner of the firm of Pizá Brothers and in regarding him as only an employee.

3rd. The judgment is erroneous in law and in fact in accepting the terms of the contract made between Messrs. Gandia and Pizá in the manner in which it was stated by Mr. Gandia in his testimony.

4th. But even conceding that the plaintiff was only an employee of the house of Pizá Brothers, and nothing more, and even accepting all the terms of the contract just as the plaintiff himself testified them to be, the judgment is erroneous in violating said contract, which is the fundamental law in the matter of this suit.

118 5th. The judgment is erroneous in granting profits from a business which was pending and which had not been and could not yet have been the subject of liquidation.

6th. The judgment appealed from is erroneous in granting to the plaintiff profits from the crops of canes and pines at Santa Barbara and Sabana Seca; it being the fact that said crops had caused a loss to the firm of Piza Brothers.

7th. And, lastly, the judgment appealed from is erroneous in admitting as net profits the supposed profits of those fields and plantations which did not arise from a balance struck between the

expenses and the income in order to reach a sure and certain conclusion pro and con of the true balance.

In testimony whereof, and to the end that the foregoing may appear as part of the record in the said appeal, we, the justices of the Court, sign the same on the date first above written.

(Signed) J. H. McLEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.

119 UNITED STATES OF AMERICA.
Island of Porto Rico:

I, P. de Castro, Official Interpreter and Translator of the Executive Council of Porto Rico, do hereby certify that the foregoing is a true and faithful translation of their respective originals, as the same appear from the record in a certain case wherein Ricardo A. Gandía Caldentey, is plaintiff and appellee and Pizá Hermanos, S. en C., defendants and appellants, which cause was lately pending in the Supreme Court of Porto Rico.

In testimony whereof, I have hereunto affixed my hand, at the City of San Juan, Porto Rico, this second day of November, in the year of Our Lord, one thousand nine hundred and eleven.

P. DE CASTRO,
Interpreter & Translator of the Executive Council of Porto Rico.

120 In the Supreme Court of Porto Rico.

No. 683.

RICARDO A. GANDÍA CALDENTEY, Plaintiff & Appellee,
vs.
PIZÁ HERMANOS, S. EN C., Defendants & Appellants.

Collection of Money.

Clerk's Certificate.

I, José Hernandez Usera, Secretary and Reporter of the Supreme Court of Porto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above entitled case are true and faithful copies of their respective originals, as the same appear on file and of record in this Office, and embodied in this transcript upon the appellant's request; I further certify, that the translation of said papers and proceedings have been made by the Official Interpreter and Translator of the Executive Council of Porto Rico, as shown by his certificate hereto attached and made a part of this transcript, and said translation has been revised, corrected and agreed to by appellee.

In testimony whereof, I have hereunto set my hand and affixed

the seal of this Court, at the city of San Juan, Porto Rico, this 4 day of November, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

[Seal Supreme Court of Porto Rico, United States of America.]

J. HERNANDEZ USERA.
Secretary and Reporter of the Supreme Court of Porto Rico.

[Eight canceled stamps.]

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No. 134.

Supreme Court of the United States

October Term, 1911.

PIZA HERMANOS, S en C.,

Appellant,

against

RICARDO A. GANDIA CALDENTEY,

Appellee.

BRIEF FOR APPELLANT.

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SUPREME COURT OF THE UNITED STATES.

PIZA HERMANOS, S. EN. C.,
Appellant,

AGAINST

RICARDO A. GANDIA CALDENTEY,
Appellee.

Statement.

This is an appeal from a judgment of the Supreme Court of Porto Rico, affirming a judgment of the District Court of San Juan (fol. 101, Rec.) in favor of the appellee and against the appellant for $15,358.23, with interest at six per cent. from March 31, 1910, (fol. 22, Rec.).

Appellee was employed by the appellant, a special partnership, by oral agreement assigning him as compensation a salary of $140 per month and 10 per cent. of the net profits of the firm's business, (Complaint, fol. 2, Rec., Paragraphs Fourth and Seventh) "as shown by each balance "that was to be made annually, as provided by "the Code of Commerce, or, at least, as near that "date as might be possible" (Test. of Gandia, fol. "24, Rec.). "The agreement * * * was ten "per cent. of the liquidated profits that were "credited to him in his personal account" (fol. 24, p. 16, Rec.).

The claim was made up of the following items (Complaint fol. 3, Rec.):

Balance of his account of salary and profits, 15 Jan., 1910.....	5,606.92	
His share of the profits in balance of 15 Jan., 1910,..	1,809.78	7,416.70
(This amount is admitted by the answer Par. 9th fol. 10 Rec.)		
10% upon an increase in value of the plantation Santa Barbara, owned by the firm (Complt. fol. 3, Op. fol. 19, fols. 88-89 Rec.)		5,941.53
10% on estimated value of unharvested crops, (Comp. fol. 3, Rec. & Op. fol. 21, Rec.).		2,000.00
		15,358.23

The appellee continued in the employ of the appellant firm from its formation in October, 1902, to the 11th of March, 1910 when he voluntarily withdrew. According to his own complaint (fol. 2, Rec.), he was punctually "credited with his monthly compensation, and "upon the taking of each and every inventory "prior to January 15th ultimo (1910) with ten "per cent. of the profits shown by such balance."

Upon leaving the employ of the firm, he agreed to accept the balance as struck on the 15th day of January, preceding, except on two points: (1) He insisted that the plantation of Santa Barbara, belonging to the firm, and carried on their inventories at a cost of $20,584.67 was worth $80,000, which accretion in value was a net profit on which

he was entitled to be paid 10 per cent. or $5,941.53. (2) That certain plantings or unharvested crops of pines and cane at Santa Barbara, and Sabana Seca, had a potential profit value which should be considered as net profits upon which he should be paid 10 per cent., amounting to $2,000 (Complaint, fols. 2 and 3, Rec. Test. of Gandia, fol. 68, Rec.), under his contract for "ten per cent. of the liquidated profits" (fol. 24, p. 16, Rec.).

The case came to trial before the District Court of San Juan on Sept. 6th, 1910, (fol. 23 Rec.). Experts testified as to the value of Santa Barbara plantation (fols. 53-55, Rec.); other experts testified as to their estimate of the probable average yield of the plantings on Santa Barbara and Sabana Seca in cane and pines, the probable product of sugar from the cane and of the market for the various products (fols. 54, 59 to 65 Rec.). Pico, the attorney-in-fact and manager of the appellant firm, testified that at that time the crops in question had already been gathered and disposed of, and had yielded no profit, but a loss (fols. 74 and 75, Rec.).

The Court accepted the prospective estimates, rather than the accomplished fact, and allowed appellee as a share of "net profits" 10 per cent. on $20,000, at which the expected result of the plantings was estimated.

The Court accepted a valuation of $80,000 for the Santa Barbara plantation, an overplus of $59,415.33 over the cost of $20,584.67, at which it was carried in the firm's inventory, (fol. 19, Rec.); held that the compensation agreed upon between plaintiff and defendant, over and above the monthly salary, was "10 per cent. of the profits of the capital of the firm" (fol. 13 Rec.) and that 10 per cent. of this increase in the capital accrued to the plaintiff (fol. 17, Rec.).

Judgment was rendered in favor of the plaintiff for the full amount claimed (fol. 22).

On appeal to the Supreme Court, that Court followed the reasoning of the court below, and affirmed the judgment (Opinion, fol. 83 and Judgment fol. 101, Rec.).

An appeal to this Court was duly allowed, and the bond on appeal given and approved (fols. 104-106 Rec.).

Assignment of Errors.

The assignment of errors (fol. 111 p. 83 Rec.) may be consolidated and summarized into the following:

I

The appellee under his contract of employment was entitled to 10 per cent. of the net profits of the business only (fols. 2, 67 and 94) and not as stated both by the District Court and the Supreme Court (fols. 13, 85, 88) to 10 per cent. of the profits "on the capital." The increase in the value of the plantation, in which the firm had invested its capital, was not profits of the business, to be distributed annually (fol. 67), "upon the making of balances, when such profits are known (p. 55), as is usual in business" (fol. 67, p. 55).

The Court erred in allowing appellee $5,941.53 as 10% of the estimated increase in value of Santa Barbara.

II.

The appellant was entitled to actual net profits only, as ascertained annually, upon the taking of annual balances, as is usual in business (fols. 2 and 67). He was not entitled to be paid in cash the expected and unrealized profits upon growing crops. At most he might have been entitled to

an interest of 10% in any profits that might be actually realized upon such crops when harvested and liquidated.

The Court erred in allowing appellee as a share of "net profits," 10% of the estimated and uncertain result of the harvesting and sale of the growing crops on Santa Barbara and Sabana Seca, especially as at the time of the trial the crops had been harvested and disposed of at an actual loss (Test. of Pico, fols. 74 and 75 Rec.).

ARGUMENT.

I.

Increase in value of plantation.

There is no dispute that appellee's compensation was limited to a monthly salary and ten per cent. of the profits of the business as shown by each annual balance.

The complaint states:

> "Fourth.—That the compensation agreed "to for the said services was a salary of One "hundred and forty dollars per month, and "ten per cent. of the net profits.
>
> "Fifth.—That he has been punctually "credited with his monthly compensation, "and upon the taking of each and every in- "ventory prior to January fifteenth ultimo, "with ten per cent. of the profits shown by "such balance" (fol. 2, Rec.).

The appellee testifies:

> "That he had agreed with Mr. Piza that "his monthly compensation was to be One "hundred and forty dollars and in addition "thereto ten per cent. of the profits as shown

"by each balance that was to be made an-
"nually, as provided by the Code of Com-
"merce, or, at least, as near that date as
"might be possible (fol. 23, p. 15, Rec.).

"The agreement with Mr. Piza was ten
"per cent. of the liquidated profits" (fol. 24, p. 16, Rec.).

And again:

"I entered into a verbal agreement with
"Mr. Antonio Piza, the only managing part-
"ner of the house; he told me that my com-
"panion, Pico and myself would also be at-
"torneys-in-fact of the house that was to be
"organized and that we would enjoy ten per
"cent. of the net profits, and that the said
"ten per cent. would be distributed annually.
"That was the understanding that we had:
"that the profits would be distributed upon
"the making of balances, when such profits
"are known as is usual in business. • • •

"I decided to withdraw from the house, to
"work for myself, more independently,
"about the year 1908, and when December
"came, which was the time for making bal-
"ances or when they should be made, I so
"informed the head of the house" (fol. 67, p. 55, Rec.).

This agreement gives him no interest in the capital of the firm nor in the accretion of value thereto.

Yet it is, apparently, upon this supposition that the Court awarded him by way of net profits a share in the increased value of the property in which the firm had invested its capital.

The Opinion of the District Court says:

"The compensation agreed upon between
" plaintiff and defendant for the said service

"was One hundred and forty dollars "monthly and ten per cent. of the profits of "the capital of the firm" (fol. 13, p. 8, Rec.).

The Opinion of the Supreme Court proceeds upon the same theory, and states, quoting from the court below, that by the agreement between the parties the appellee's compensation was to be

"ten per cent. of the profits on the partnership capital" (fol. 86, p. 67, Rec.).

This error is emphasized by the very allegations of the plaintiff-appellee that he was credited with these profits in cash annually after the making up of the balances; in other words it was only after the profits had been actually realized in cash, and their "net" character thus established that they were actually credited to the plaintiff who drew upon his account as he chose.

This ten per cent. of net profits was credited to him in his account in the same manner as the monthly salary agreed to be paid him. The salary was a fixed charge and liquidated debt. The ten per cent. of net profits could not be credited to him on his account until it, also, was ascertained, and had become certain, fixed and liquidated. And this, plaintiff himself avers, was to be done "after each balance." It could scarcely be done with reference to any real—or supposed —and estimated accretion in value of the firm's capital invested in plant.

Inventories were made, and balances struck, through several years, and accepted by the plaintiff, and on none of these accounts, to be found at pp. 21, 25, 27 and 30, was the plaintiff ever credited with ten per cent. of any increase in value of the property or plantation in which the firm's capital had been invested.

If on the other hand the statement in the Opinion of the Supreme Court at fol. 89, p. 70, Rec., below, that the increase in the value of Santa Barbara was considered as net profits, in the balances struck between 1904 and 1910, and the appellee credited with ten per cent. on account thereof, were correct, then, clearly, the judgment below would be chargeable with error in not taking into account the profits so credited.

Under the Civil Code of Porto Rico even an industrial partner not contributing capital cannot claim any part of the firm's property.

Civil Code §1610 * * *. The partner contributing his services only shall not be given any part of the property contributed, but only its fruits and profits, etc.

AUTHORITIES.

Gray v. *Darlington*, 15 Wall., p. 63.

Under an Act of Congress of March 2nd, 1867, which provided that "there shall be levied, collected and paid annually upon the gains, profits, and income of every person, etc., etc., a tax of five per centum," Gray, the plaintiff, was assessed upon a sum of $20,000 being the advance at which he sold his bonds, the assessor alleging this advance to be gains, profits, and income of the plaintiff for that year.

The Supreme Court, Field, *J.*, says:

> "The advance in the value of property "during a series of years can, in no just "sense, be considered the gains, profits, or "income of any one particular year of the "series, although the entire amount of the "advance be at one time turned into money "by a sale of the property. The statute "looks, with some exceptions, for subjects "of taxation only to annual gains, profits, "and income.

"Its general language is 'that there shall "be levied, collected and paid annually, * * * "a tax of 5%, * * *

"This language has only one meaning, "and that is, that the assessment, collection "and payment prescribed are to be made "upon the annual products or income of "one's property or labor, or such gains or "profits as may be realized from a business "transaction begun and completed during "the preceding year. * * *

"The mere fact that property has ad- "vanced in value between the date of its ac- "quisition and sale does not authorize the "imposition of the tax on the amount of the "advance. Mere advance in value in no "sense constitutes the gains, profits, or in- "come specified by the statute. It consti- "tutes and can be treated merely as increase "of capital. * * * The actual advance "in value of property over its cost may in "fact reach its height years before its sale; "the value of the property may, in truth, be "less at the time of the sale than at any "previous period in ten years, and yet, if the "amount received exceed the actual cost "of the property, the excess is to be treated, "according to their views, as gains of the "owner for the year in which the sale takes "place. We are satisfied that no such re- "sult was intended by the statute."

The analogy with the case at bar seems to us very strong. Just as the tax was to be assessed and levied annually, so the ten per cent. of profits was to be ascertained annually by the firm's balance. Those annual balances were made and accepted by the plaintiff, and constitute so far Accounts Stated until the balance of 1910 in which

the question of increased values of Santa Barbara was disputed. But this advance in value, as stated by the Court, does not constitute annual profits; it "constitutes and can be treated merely as increase of capital" in which, obviously, plaintiff had no interest.

Lepore v. *Building & Loan Assoc.*, 5 *Pa., Superior Court*, pp. 276-280:

> "The 'profits' are defined to be 'the re-"ceipts of any enterprise or business ex-"ceeding the expenses incident to it' (19 "Am. & Eng. Encyc. of Law 257). The "word 'profits' has a fixed and definite "meaning, and imports the net amount made "after deducting any proper expenses inci-"dent to the business. And, again, it is "said, the usual, ordinary and correct mean-"ing of the word 'profits' is the excess of "receipts over expenditures (19 Am. & Eng. "Encyc. of Law 258).
>
> "As a general rule the term 'net profits' "may be defined to be the gain made by the "merchant in buying and selling goods after "paying all costs and charges for transact-"ing the business." (Foster *v.* Goddard, 9 Fed. Cas. at page 541) (Clifford, *J.*) (1 Cliff., 158), Affd., 1 Black, 66 U. S., 506.

Hazelton, Belfast R. R. Co., Am. State Rep., pp. 330, 332, 334 (Maine, 1887).

Under a by-law providing for dividends "from the net earnings of the road:"

> "The inquiry must be whether or not "profits have been earned in the particular "year at the expiration of which dividends "are demanded."

In Hill *v.* Supervisors, 4 Hill. 20, it is said:

> "Profits generally mean the gain which "comes in or is received from any business "or investment when both receipts and pay- "ments are to be taken into account."
>
> "Profits for the year mean the surplus re- "ceipts after paying expenses and restoring "the capital to the position it was in on the "first day of January of that year."
>
> "When all liabilities are paid, either out "of the gross receipts or out of the net earn- "ings, the remainder is the profit of the "shareholders."

In *Last* v. *London Assur. Corp.*, 10 App. Cas., 438-450.

Lord Fitzgerald says at page 450:

> "We are bound to adopt the interpreta- "tion put on 'profits' in *Mersey Docks* v. "*Lucas* (8 App. Cas. 891, 905) that the ex- "pression means 'the incomings of the con- "cern after deducting the expenses of earn- "ing them', or 'income of whatever charac- "ter it may be over and above the costs and "expenses of receipt and collection.' and "that 'the gains of a trade are what is "gained by the trading for whatever pur- "pose it is used.'"

In the Matter of Proctor—85 Hun (N. Y.), 572-575, the facts briefly were as follows:

Under the Will of one John Biden his widow was given "the interest, income and profits of the sum of $6,000, which interest or income should be payable to her at the times the same accrues on the investment of said $6,000.

The money was invested in Rochester City water bonds, and the widow received the interest

up to Jan. 1st, 1894. She died Feb. 11, 1894. At that time the bonds were worth a premium of 27 per cent. and were afterwards sold by the administratrix with the will annexed for $7,620. The Surrogate determined that the representatives of the widow were not entitled to the premium received upon the sale of the bonds and the Appellate Court held that the widow was not entitled to the accretion in value.

At page 575, the Court wrote:

> "The principal sum of the bonds belonged "to the estate of the testator, and there is "nothing in the will to take it out of the gen- "eral ruke on the subject that the increment "from natural causes is regarded as a part "of the capital or principal fund, and goes to "the remainderman or residuary legatees."

In *Merchants Nat. Bank* v. *Barnes*, 32 App. Div., pp. 92-98, the facts were that one Brown and Barnes as parties of the first part agreed to put in as much time as might be necessary to the harvesting, piling and housing of ice, for which they were "to receive one-fourth of the net profits realized on sale and settlement after the ice is disposed of"; and the parties of the other part agreed to furnish the lumber and money necessary to pay all help and other expenses and to sell such ice, and after deducting all expenses, and advances, to pay to the parties of the first part "one-fourth of the net profits of such venture." "it was held that the ice housed belonged to Barnes, that Brown had no interest in the profits as such as distinguished from the measure of the amount of compensation Barnes agreed to pay for his services; no proprietary interest in such profits before the division of them into shares.

In *Bigelow* v. *Elliott*, 3 Fed. Cas., p. 349, Op. at p. 353, it was said:

> "A person in trade or business may em-
> "ploy another as clerk or servant, and
> "agree to pay him a share of the profits,
> "without giving him the rights of a partner;
> "*and if he holds no interest in the capital*
> "*stock*, and there are no other circumstances
> "to show any mutuality of interest between
> "them, he will not be held liable even as to
> "third persons, merely because he was com-
> "pensated in that way." (Citing Burckle v. Eckart, 1 Denio, 342; 3 N. Y., 142.)

It was therefore, we submit, clearly error on the part of the Court below to allow the plaintiff-appellee the sum of $5,941.70 as ten per cent. of net profits gauged upon the increase in value of the Santa Barbara plantation.

II.

Unharvested crops.

The plaintiff voluntarily abandoned his employment on the 11th day of March, 1910, (Para. VIIth of Complaint, fol. 2—foot of Page 1, Rec.; Test. of Gandia, fol. 43, p. 37, Rec.; and fol. 67, p. 55, Rec.).

At that time there were plantations of cane and pines on the estates of Santa Barbara and Sabana Seca (Comp. Para. VIIIth, fol. 3, P. 2, Rec.; Test. of Gandia, fol. 68, pp. 55 and 56, Rec.).

The crops were not yet harvested; much less were they reduced to commercial merchandise; and still further was their prospective sale, the liquidation of the operations of their sowing, cul-

tivation, harvesting and collection in cash of their sale price, and the settlement of the accounts of expenditures incurred, as against returns received, so as to strike a balance, which, if on the credit side would constitute the net profits out of which Gandia was to be paid ten per cent.

The expenditures on these plantations were not slight; for 1909 and 1910 they aggregated $23,261.33 (p. 31 of Rec.).

Gandia's claim is, that after having advanced these moneys in the cultivation of crops still immature and unharvested, the defendants should be compelled, without awaiting the result of the operations, to make further advances by payment to him of ten per cent. on an estimate of the ultimate realizable value of the crops, which could not be other than surmise and speculation—for the value of the pines depended upon the market at a future day—subject to the uncertainties of all growing things—and to the further uncertainty of the supplies from the many other pine cultivations, while the cane was subject to the additional uncertainty of the Tariff on sugar importations into the United States.

Witnesses were introduced (pp. 49 to 52 of Rec.) to give their opinion of the prospective yield of the cane and the pines on these two plantations, and of their ultimate probable market value.

At the time of the trial, all estimates, conjectures and opinions were irrelevant, for the crops had been gathered and disposed of. Mr. Servando Pico, the attorney-in fact and manager of the defendant's firm, testified (fol. 74, P. 60, Rec.) as to the actual crops harvested and sold.

To illustrate the difference between "estimate" and "fact": the witness Calderon for the plaintiff testified (p. 50), that he had planted 115

cuerdas of plantilla cane and 20 cuerdas of ratoon cane; he estimated the yield of the 150 acres at 600 quintals and the cuerdas of ratoon at 400 quintals; that a quintal of cane yielded five and three-quarter pounds of sugar, the price of which fluctuated, but that $138 gross per cuerda, with $60 expenses would be a fair estimate netting $78 per cuerda. The witness Sifre makes a similar estimate (p. 51). The witness Hansard (pp. 51 and 52), estimates the pines 80 cuerdas at Santa Barbara and 20 at Sabana Seca at $420 per cuerda net, at a yield of 300 boxes per cuerda. The witness Nobles (p. 52, Rec.), makes a like estimate of 300 boxes of pines per cuerda at a value of $2.50 per box.

The witness Servando Pico, the manager of the defendant firm (p. 60), testifies as to the actual facts of these plantations:

> "As to the crops at Santa Barbara, the "harvest of the cane was finished in the "month of April, and the pines for the crop "of 1910, in July. * * *
> "the products were sold; the cane from "January to April, which is the average; the "sugar every day; the quantity of cane is de-"livered daily and the mills render a weekly "statement of the sugar therefor, to be sold "when it is thought advisable fifteen days "thereafter. The last transaction on sugar "was made in the month of April, and on "pines in June. The said account of pines "and cane did not yield any profit. I cannot "state precisely how much loss there was; "they yielded a loss. 11,000 boxes of pines "were sold. I cannot say the quantity of "sugar produced on that number of cuerdas. "The average weight was 280 quintals per "cuerda. About 41,000 quintals for the whole "plantation."

This evidence of Pico would certainly seem more conclusive than the estimate of possibilities or even probabilities on which the Court based its judgment. The estimate of the value of the crops rested upon an estimated yield, and the statement of Pico shows the actual yield to have been vastly inferior to such estimates.

To repeat: at the time of the trial the crops had been harvested and sold; they had proved a loss and not a gain; the amount of the loss was immaterial; no matter how infinitesimal, its existence proved there were no profits upon which the plaintiff had a right to claim and recover $2,000, as he did.

Yet the Court below (p. 14, Rec.) chose to accept the estimates of a prospective yield, rather than the positive evidence of the actual yield. The Court refers to the fact that the defendant had in its possession the books in which said accounts were necessarily kept. But these books were available to the plaintiff under the Porto Rico code cited below; he could have had them produced if he had so chosen, and the record (p. 3) shows an application for the inspection of the defendant's books,—the balances and inventories from which were introduced by the plaintiff (p. 20 Rec. et seq.).

Code of Civil Procedure *Section 314*, provides for inspection of writings. Under that section the Court may order either party to give to the other inspection and copy or permission to take a copy of entries of account in any book under his control, containing evidence relating to the merits of the action or the defense therein.

If compliance is refused, the book may be excluded or treated as evidence by the party applying and shall be presumed to be as he alleges them to be.

Party may also be compelled to produce books when examined as a witness.

The plaintiff had made the allegation of profit on these plantations, and the burden was upon him to establish it, not only under Common Law Rules, but, specifically, under the Porto Rico Statutes, Art. 1182 of the Civil Code, and Arts. 108 and 162 of the Law of Evidence as follows:

"*Civil Code §1182.* PROOF OF OBLIGATIONS.
" GENERAL PROVISION.
"Proof of obligations devolves upon the "persons claiming their fulfillment, and that "of their extinction upon those opposing it.

"*Law of Evidence*, Tit. III.

"OF THE PRODUCTION OF EVIDENCE
" Chap. I
" By whom to be produced
"SECTION 108. The party holding the af- "firmative of the issue must produce the "evidence to prove it; therefore the burden "of proof lies on the party who would be "defeated if no evidence were given on "either side; the proof of an obligation de- "volves upon the party claiming their ful- "fillment, and the proof of the extinction of "an obligation devolves upon the party op- "posing the obligation.

" TITLE VI.

"of the effect of evidence

"*Section 162.* The effect of evidence is "not arbitrary, but to be exercised with legal "discretion and in subordination to the rules "of evidence. * * * In civil cases the "affirmative of the issue must be proved. "* * *

The Supreme Court on appeal took a like view of this claim (Op. P. 77 Rec.) and held that the cane and pineapple fields should be appraised, and their value liquidated on the 11th day of March, the date of the voluntary retirement of the plaintiff from his employment, and he should not await their actual liquidation in order to ascertain the positive net profits, but that for the purposes of liquidation the expert's estimates should be accepted (Foot of page 77 Rec.).

AUTHORITIES.

Foster v. Goddard, 9 Fed. Cases 541—(Clifford, *J.*).

Upon an agreement by which the complainant covenanted to give his services to the defendant for five years, for "one-tenth of the net profits of the business, part of which was the sale of ships used in the defendant's trade, held that a ship which was on the high seas in October, 1848, at the time of the expiration of the contract, did not reach Boston until December, 1848, and was sold in February, 1849, entered into the agreement, and complainant was entitled to his interest in the profits of the sale, regardless of the fact whether such vessel had enhanced in value since the expiration of the agreement. Held also that he was entitled to his share of the profits of the voyage, although it only terminated two months after the expiration of the agreement (at p. 542).

So with accounts outstanding at the termination of the agreement. They are not to be valued at the date of the termination of the agreement by deducting the discount necessary to make the debts due equivalent to cash at that date. Complainant was entitled to his share of profit on the amounts actually received after the expiration of the agreement (at p. 543).

Wallace v. *Beebe*, 12 Allen, p. 354 (94 Mass.).

Under a contract made with one Wallace, with the firm of James M. Beebe & Co., under which Wallace in lieu of salary for the term of three years, agreed to receive in compensation for his services five per cent. of the net profits of a department in the business of the firm of Beebe and Co. Wallace claimed to be entitled to a share in the profits made upon goods on hand on the 1st day of January, 1863, the date of the expiration of the contract, or ordered before that date, but not sold by defendants until afterwards. The Court held that the contract expressly limited the duration of the plaintiff's interest, as well as of his services in the defendant's business, to the three years which ended on that day; that the net profits of which he was to receive five per cent. in lieu of salary, consisted "of the moneys received from sales of goods, deducting their cost and expenses."

The balance of defendant's interest in the business of the firm was to be paid over to him upon a settlement of the firm's affairs at the expiration of the agreement which was at the end of three years, and says the Court, it

> "could not be so paid if it were necessary "to wait until all the goods on hand or ordered should have been sold. This 'settlement of said firm's affairs' evidently means "a making up of the accounts as they stand "at that date, not a winding up of the whole "business in which the firm is then engaged.
>
> * * * * * *
>
> "The mode suggested by the plaintiff, for "estimating his share of the profits in goods "unsold on the 1st of January, 1863, is either "to make an estimate of their actual value "on that day, or to take the amount at which

"they are afterwards sold. But an esti-
"mate of their value on that day is not pro-
"vided for in the contract, nor in fact made
"by the defendants in the ordinary manage-
"ment of their business, and would be no
"measure of the profits actually made upon
"sales.

"And to give the plaintiff an interest in the
"profits of sales made after that day would
"be to extend his interest beyond the term of
"three years to which by the contract it is
"limited, and after he had ceased to render
"the services for which his interest in the
"business was a compensation.

"The plaintiff, under this contract, shares
"in the gains of all business brought to a
"close within the three years, whenever com-
"menced; and in the profits of all sales made
"within that time, even of goods bought be-
"fore the beginning of the term; but has no
"concern in sales made after his interest in
"the business has ceased."

Under either of these authorities the judgment below was erroneous. If plaintiff's contract was such as to give him a right to profit in outstanding and uncompleted transactions such as the contract in Foster *v.* Goddard, then the allowance should not have been upon a "valuation" of the outstanding ventures, but only "on the amounts actually received," which were none.

If, on the other hand, the plaintiff's contract was at an end when he voluntarily terminated it on March 11, 1910, he was entitled to no gains or profits realized after that date when his services ceased and with his services his right to any further compensation.

Under the Porto Rico Code of Commerce even

a retiring partner would have no right to participation in the profits until they were actually liquidated.

Code of Commerce.

"Art. 225. A member who retires from a "partnership on his own accord or who sug- "gests its dissolution can not prevent pend- "ing transactions from being concluded in the "manner most convenient to the common in- "terests, and until said transactions are con- "cluded the division of the property and "goods of the copartnership shall not take "place."

We respectfully submit that it was error for the Court below to consider as 'net profits' the uncertain, unliquidated results of growing plantations, and, that at best, if the plaintiff was entitled to any portion of profits earned, after he had voluntarily left the firm, he was only entitled to them after they had become liquidated and net profits, while the testimony shows that the plantations resulted in no profits at all.

III.

CONCLUSION.

The two propositions discussed above seem to us so clearly to show error on the part of the Court below, that we have refrained from going into many particulars for which the case affords an opportunity, to show the misconceptions of the Court below which possibly account for the decisions reached, and we shall simply allude to a few of them here.

(A) At fol. 17 of the Record, the Court states that the defendant:

"Acknowledges under Paragraph Fifth of "its answer, that for the purpose of the bal- "ance of liquidation brought about by the "expiration of the commission of the plain- "tiff, the value of the estate Santa Barbara "was fixed at $60,000."

A reference to Paragraph Fifth of the answer shows that the parties had agreed merely to accept the balance of January 15th: "Except as to "certain points in controversy stated by the plain- "tiff in paragraph eighth of the complaint" (p. 6, fol. 9 Rec.).

Paragraph Eighth of the Complaint shows that the points in dispute were plaintiff's claim upon the increase in value of Santa Barbara and for a profit on the growing plantations.

Again, at fol. 18, the Court makes the statement that the defendants "Have accepted a value "of $60,000 in the answer to the complaint."

This, as has been shown, is an error. The only evidence in reference to $60,000 is the testimony of plaintiff's attorney, Mr. Sarmiento, at page 64 Rec., and of the defendant's attorney Mr. Lopez at p. 64 Rec., relating to an effort at compromise which these two gentlemen were unable to carry into effect.

(B) In the Opinion of the Court, treating of Santa Barbara and the right of the plaintiff to a share in its increase in value, the Court refers to the defendants' firm as "dealing in real estate" (fol. 90 p. 70 Rec.).

There is no evidence that they were dealing in real estate; they were a mercantile firm, conducting, as the Court says in the same paragraph: "Various mercantile establishments, sugar plantations and pineapple farms."

If they had been dealers in real estate, and Santa Barbara had been purchased for the purpose of re-sale, and not for the purpose of operating in its products and had been re-sold, the case might possibly have been different.

(C) The court refers (p. 71, fol. 90) in order to show that the growing crops were considered as profits by the firm, to the fact that in the balance of 1904, the firm included as part of its assets "22,000 quintals of cane" which was yet to be ground. But cane, cut and weighed, has an actual market value, saleable on the spot; it is not a growing crop, unharvested and still immature.

(D) At fol. 91 (foot of p. 71) the Court remarks that if a tornado had entirely destroyed the crops on the plantations it

> "could not have affected the rights of the "respondent. His compensation is fixed by "a valuation of the property made at the "date of *his discharge* and not at any date "subsequent thereto."

We have already seen that the plaintiff was not discharged but voluntarily left his employment. And this fact is further attested by Finding V of the Special Verdict at p. 86, fol. 115, Rec., which says:

> "He left the firm of his own will and for "his own convenience."

May it not well be that this idea of a discharge which "did not affect the rights of the respondent" affected the judgment of the Court below, and led it into the errors of which the appellant now complains?

IV.

The judgment below should be reversed.

Respectfully submitted,

December 5th, 1913.

PAUL FULLER,
FREDERIC R. COUDERT,
Of Counsel for Appellant.

Supreme Court of the United States,

OCTOBER TERM 1911.

No. ~~177~~. 134

PIZA HERMANOS, S en C.,

Appellant,

vs.

RICARDO A. GANDIA CALDENTEY,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM.

FREDERIC R. COUDERT,
CHARLES B. SAMUELS,
Counsel for Appellant.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 876.

PIZA HERMANOS, S. en C.,
Appellant,

vs.

RICARDO A. GANDIA CALDENTEY,
Appellee.

Appellant's brief in opposition to motion to dismiss appeal.

The alleged grounds of this motion are that the appeal was taken for delay only and that it was frivolous.

The case in outline is substantially as follows:

There were two firms of Piza Hermanos, the first thereof terminating October 27, 1902, when the appellant firm was organized. The appellee had long been in the service of the old firm and when it was succeeded by the appellant he connected himself with the latter under an oral agreement which provided for compensation at

the rate of $140 per month and, in addition thereto, 10% of the net profits as shown by each balance that was to be made annually, as provided by the Code of Commerce, or, at least, as near that date as might be possible (pp. 15 and 55).

On March 11th, 1910, the *appellee* terminated the relation and demanded a settlement. The parties agreed upon all points except two: (a) the valuation of an estate named "Santa Barbara"; and (b) the profit upon certain cultivations and plantings of pine apples and cane, which had not produced their marketable crops.

The development of the case with respect to these propositions brought out three questions in the mind of the trial judge: (1) Whether the appellee was entitled to the 10% in cash or in kind; (2) Whether the estate Santa Barbara should be valued at $60,000 or $80,000; (3) Whether there was any value at all in the cultivations and plantings.

The trial court, in answering these questions, decided that the appellee was not a partner; that he was merely an employee; that he was entitled to his percentage in cash; that the value of the estate Santa Barbara and of the cultivations and plantings should be included in the balance; that the value of the first was $80,000, and of the latter in excess of $20,000. Deducting the cost of Santa Barbara from its value of $80,000, it held that the appellee was entitled to 10% of $59,415.33 on account thereof; to $2,000 on account of the cultivations and plantings, and to $7,416.70 conceded by the appellant to be due; making the total of $15,358.33 for which judgment was rendered against the appellant. This judgment was sustained by the appellate court of Porto Rico.

and the present appeal brings up for consideration two major propositions, not to mention a number of important collateral points:—

(1) Whether a person engaged under an oral contract at a monthly sum of $140, plus "10% of the profits as shown by each balance that was to be made *annually*," can quit whenever his whim or fancy suggests and compel the person permanently engaged in the enterprise to give him *in cash a percentage upon an estimated increase in value of certain parts of the permanent plant used in producing the articles from the raising sale of which the profits of the business*

(2) Whether such a "quitter" is entitled in advance of realization upon crops being raised —while the crops are still unripe and unharvested —to a percentage upon the estimated profits thereof, when as matter of fact the final event showed there was no profit at all, but, to the contrary, a loss.

The courts below ruled in favor of the man who "threw up his job" on both propositions. In the opinion written in the Supreme Court of Porto Rico (and this was practically a repetition of the opinion delivered by the trial court) the reasons given for considering the increased value of the real estate as part of the net profits, were—

(a) "That this estate was purchased at a low price and that the plaintiff himself as agent of the firm made the trade and secured the bargain." But this ignored the fact that not a penny of the appellant's money went into the purchase which was at $12,000, or the betterments, which added about $8,000 more, the en-

tire purchase price and the cost of the betterments having been charged against the capital of the concern and in the annual settlements, as part of the total capital, attributed between the two owners of the business according to their respective percentages. It ignored the fact that a plant was necessary to the conduct of the business; that the business conducted was not the exploitation of the plant for profit, but, to the contrary, that the business for which Sana Barbara was bought, the business from which the divisible profits were to come, was the raising of cane and pineapples. If the firm business had been the purchase and sale of lands, and Santa Barbara had been bought as a vendible commodity, it would have constituted a part of the profit earning stock in trade. But even so, no more account should be taken of prospective profit thereon than upon the stocks of merchandise on hand awaiting sale. Its purchase was not for this purpose. Its acquisition was permanent. The appellant was conducting a permanent, established business. But the relation established between the parties was terminable—as proven by the act of the appellee—at a moment's notice, or without any notice at all. Is it right, is it equitable, is it just that the permanent establishment—that part not involved in the annual turnover of the enterprise—should be charged either with increase or fall in intrinsic value through causes extraneous to the business? If depreciation had been caused by wear and tear resulting from actual operations that would have been an incident of the business; but if an estimated, not actual, decline in value had taken place in what experts should consider the market value

at the time of any annual settlement and this decline had been charged off, it is safe to assume that the appellee would have been loud in his protestations of injustice. The principle is equally applicable to the reverse of this situation. The appellee was entitled to 10% upon the profits realized in the course of the business which the firm was organized to conduct, *but not upon imaginary, theoretical increases in the value of the machinery of the business.* The injustice of the appellee's claim is evidenced by its exact analogy to this state of fact: suppose the firm had begun a new business in a new field. Its good will at the start would have rated at zero—the same as in case of any beginner. Suppose, as was the case, that prosperity followed the enterprise and, in consequence thereof, as doubtless was the case, that this good will became of great value. Is it conceivable that a mere underling, who was not bound to stay to the end of any week, could force a sale—could force the destruction of the business so that he might share, not in the profits of the business, but in the value of the business resulting from its ability to make those profits? That is the case at bar in a nutshell. The appellee was promised a part of the profits of the business, not a share of increases in value of either good will or plant resulting from their profit producing power. If the appellee be right, no employer dares to promise his clerk a percentage lest thereby he arm his employee with power to pull down his house, and give him a voice, commensurate with his percentage, in the collection of the wreckage. As "the power to tax is the power to destroy," so the power to exact such a percentage is the power to bring a business to an end.

These considerations, briefly hinted at, under this point alone, show the necessity for a full hearing of the appeal.

(b) That "in the balance struck in the years 1904, 1905 and 1906 this increase was considered as net profits and the plaintiff was credited with ten per cent thereof as part of his compensation." The basis of this statement is not disclosed by the record. It does not appear in any document or in any part of the printed testimony, and whether the courts below were mistaken as to the facts, or developed the conclusion by unwarranted inferences, it is impossible to conjecture. It suffices to say that the remark is not supported by any testimony before this court. It does not appear directly or indirectly in the facts certified to this court by way of a special verdict. The inventories and schedules do not show it. These inventories and schedules do show that when money was expended on account of the property, as distinguished from its operation, it was charged against capital, thereby showing a clear distinction in the minds of the parties—and particularly in the mind of the appellee before the present events brought him the possibility of an additional ten per cent—between profit sharing operations and permanent ownership by the firm. If the firm ownership had not been distinct from profit sharing ownership, clearly all costs and expense subsequent to the initial purchase price of $12,000 would have been charged against operation; and then upon a termination, such as now before the court, the appellee might with some show of reason have claimed an allowance of 10% on account of the remaining permanent benefits resulting from these costs and expenses. But the exact reverse was the method

followed, and this demonstrates that the ownership was wholly exclusive of the appellee, and that the incidents of ownership, including the possibilities of increase or fall in value, pertained alike exclusively to the appellant;—particularly since it is shown that the situation of this property in the business was about the same as that of a loaned horse—the parties to share what the horse might earn, not the depreciation incident to age and wear or the increase in value on account of some unforeseen virtue.

Can it be inferred from the sharing of profits resulting from the sale of merchandise that the potential profits of the stocks in hand when the separation occurred should be estimated and the appellants muleted on account thereof? It cannot be contended that the profit in Santa Barbara was more than potential; and if the possible profits of calicoes and embroideries and shoes are not to be taken into account why the contrary with respect to something that was not bought to sell?

The courts below stated in their written opinions that the increased value of the real estate was considered as net profits in the balances struck in 1904, 1905 and 1906, 1907 and 1910, and that the appellee was credited with 10% on account thereof.

If this be true, a grave error was committed against the appellant for the appellee is actually allowed the percentage upon the gross estimated increase in value between its cost of $20,584.67 and its appraisement of $80,000 without any deduction whatsoever on account of these alleged previous credits.

If the courts below were right the increases of 1904, 1905, 1906, 1907 and 1910 are duplicated, and

the appellee has already had 10% on account thereof. It does not appear what specific sums were included in the settlements of the years named on this account, but much of the increase may have taken place during any one of those years, and in the settlement thereof the appellee may well have been paid in full already.

That the court considered the credits favorable to the appellee as substantial is evidenced by the fact that in speaking of the balances struck in 1907 of $9,450.33 and in 1910 of $7,789.57, it said "In these sums this increase in the value of Santa Barbara is included to make up the *respectable* amounts stated." There is no legal principle, even adopting the unsupported statements of fact in the opinions below, entitling the appellee to receive the 10% twice. Once is enough for most people. In either aspect of the matter, the conclusion below is erroneous.

Furthermore there were to be, and were, annual settlements. Inventories and accounts were stated, balances were struck and the appellee given 10% of the approved result. Were not these settlements binding and conclusive as to all matters that might have been embraced therein? If the increase in value of Santa Barbara was not included from time to time, is not this proof that the parties did not contemplate the payment of a percentage on account thereof? Is it open to the appellees to go behind these statements and in the absence of fraud claim that this or that should have been included therein? Were not these settlements what the word implies, viz., finalities?

Do not the points under this subdivision call for a full hearing?

(c) That the pleadings left open only a question as to whether Santa Barbara should be valued at $60,000 or $80,000; that they were in such form as to amount to an admission by the appellant that the appellee was entitled to the percentage upon the increased value. This is erroneous. Paragraph 5th of the answer says "both * * * parties * * * agreed to accept [the balance of January 15, 1910] except as to certain points in controversy stated by the plaintiff in paragraph eighth of the complaint." The points stated in said paragraph eighth were "the *valuation* of the estate named Santa Barbara" and "the *profit* in the cultivations of pines and cane on the estate Santa Barbara," etc. What effect the inclusion of a greater or less value of Santa Barbara would have had upon the rights of the appellee under the statement of January 15th, 1910, is not apparent from the record. That statement shows a divided profit of $18,097.81. This figure does not seem to bear any relation to the values extended for any property; so that if the valuation set therein upon Santa Barbara had been $80,000, its sole effect, upon the face of the statement and in so far as anything contained in the testimony is concerned, would have been to make the total assets about $146,000 instead of $126,000—all of which it appears belong to Antonio Piza and Francisco Piza, less certain balances belonging to the appellee and Servando Pico in the shape of indebtedness.

The consent to debate values of Santa Barbara, if such were given as stated in the complaint, does not imply a concession on the part of the appellant that the appellee was entitled to any part thereof. The whole history of the action shows that the appellant never meant that. The denials

in the answer and refusal to pay at all are proof of this. Paragraph Eleventh of the answer clearly means that the appellant refused to include Santa Barbara among the items subject to participation by the appellee, and it is impossible to see how the courts below could have construed any part of this pleading as an admission of the claim which has been the principal subject matter of this controversy. It almost requires the zeal of a partisan to reach such a conclusion. No rule of construction required such an interpretation. The requirements of justice refute it.

Do not these considerations also show that the appellant is entitled to a full hearing?

The courts below were not so explicit in argument or illustration with respect to their conclusion that the appellee should have a percentage upon the unproduced crops—upon potential profits while subject to all the hazards of the enterprise. Broadly speaking the basis of their decision was that an employee, promised a share of a venture, could abandon it at any time and require a percentage upon the estimated value of the expectancy at the time of abandonment and, as expressed in the homely phrase, leave the employer "to hold the bag," to employ somebody to take his place, or, if unable to do so, to do the employee's work himself. The appellant contends that the venture was entire; that its promise was conditioned upon the reaping of profit; that profit was to constitute the net result, not the favorable prospects of one day, while the blights and dangers of a succeeding one were to be weathered. It contends, also, that the arrangement implied a

reciprocal engagement on the part of the employee to remain until the results could be measured, could be ascertained. The doctrine of unilateral contracts, familiar to the common law, must of necessity, through the principles of equity pervading the civil law, be none the less applicable to the case in hand. And what court would award anything to a man for partial performance when the promise on the one hand is payment for a completed act? That profits were promised in this case shows most clearly that the employee should remain until something definite and final in the shape of gain had been realized or become realizable. The court below argued that a tornado, subsequent to the appellee's *discharge* (sic) might have destroyed the crop. But that risk would have been run if the appellee had remained, and there is no reason why he should be given a better position by quitting than by staying. The court also said that if the prices of "sugar and fruit had . . . doubled or trebled the increased profits would have enured solely to the benefit of the firm". But the answer to that is patent: the appellant voluntarily abandoned his chances in that respect. He had the right to stay, the court's remark about his discharge to the contrary notwithstanding. He was not discharged. The special verdict, certified to this court, says "he left the firm of his own will and for his own convenience". If he had been discharged, his rights, necessarily, would have been different. But as he left "of his own will" he left his chances behind him.

May it not well be that the decision adverse to the appellant upon this point was because the courts below mistakenly thought the man had

been discharged? An opportunity is needed to fully review not only this manifest inaccuracy but the principles involved in the fundamental proposition.

The facts certified in the special verdict, should be reviewed, as well as the legal conclusions based thereon. An opportunity is needed for this.

The motion of the appellee to dismiss and affirm should be denied.

All of which is respectfully submitted this 1st day of April, 1912.

FREDERIC R. COUDERT,
CHARLES B. SAMUELS,
Counsel for Appellant.

11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 134.

PIZA HERMANOS, S. EN C., APPELLANTS,

vs.

RICARDO A. GANDIA Y CALDENTEY, APPELLEE.

BRIEF FOR APPELLEE.

A. SARMIENTO.
CHAS. F. CARUSI.

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Argument.

bring about a dissolution at any time. This agreement provided that monthly trial balances should be made, and, in addition, that each year there should be made a general balance to show the condition and standing of the firm. It was further agreed between the two partners that the appellee, Mr. Ricardo Gandia y Caldentey, and another employee, Mr. Servando Pico y Perez, should, beside a fixed monthly salary, receive 10 per cent of the net profits as should be obtained at the expiration of the company, *and in case they should be discharged from the house or should voluntarily withdraw a proper balance should be made*, and that "in accord therewith" such part of the profits as might accrue to them could be delivered to them proportionately in cash, accounts, and other property of the firm.

These provisions were contained in a contract between the appellants to which the appellee was not himself a party.

It is testified by him and not denied by the appellants that he was asked by the elder Piza to continue with the new firm on the basis of a fixed monthly salary and a share of the profits of the business—

> "as shown by each balance that was to be made annually as provided by the Code of Commerce, or, at least, as near that date as might be possible, which said profits were to be credited, as they were credited, to his personal account, which was the only account that he had with the house." (See Record, p. 15, folio 24.)

This agreement was a verbal one made with Don Antonio Piza, and there was no written stipulation or agreement concerning the matter to which the appellee was a party, either expressly or by implication. As to the instrument of organization, the appellee testified (Record, p. 16, folio 25):

> "This instrument is dated October 27, 1902.
> "Mr. Antonio Piza without consulting, as he was not obliged to do so, those who were to be its attorneys or who were then its attorneys, executed that instrument; that instrument was executed October 27. On

the following day, October 28, he sailed for the United States; from the United States he went to Europe; his wife was taken ill and he returned to Porto Rico, November 28, 1903, thirteen months after the execution of the instrument. The said instrument remained in possession of the notary and came to the house, came to my hands, after the same had been recorded in the Commercial Registry, so that, as he figures, two or three months elapsed from the date of the instrument to the time when he saw the same; that he read it and was surprised at clause 5 thereof, but inasmuch as that was not the agreement that he had made with Mr. Antonio Piza and as the witness had had no intervention whatever in the instrument, he always thought that such instrument was not at all binding upon him, and he always expected to be able to call the attention of his chief to that point; but Mr. Antonio Piza took thirteen months to return to Porto Rico; immediately upon his return there was a talk about making a general balance; it did not seem to him opportune, before a balance, to speak about that, and he waited for such balance and for the apportionment of the profits to see the way in which the same were distributed, and if it was not in the manner agreed upon then file his protest, and if it was done as agreed, to then, of course, say nothing."

The first accounting after the return of the elder Piza shows that the terms of the verbal agreement were made the basis of the accounting (Record, p. 21).

From the books of account and balance sheets set out in the record, from pages 18 to 34, it would appear that the firm engaged in a business that was fairly extensive, but of exceptionally varied character. For instance, among the other items are such merchandise as would be found in the ordinary general store in the country. In addition to this the firm owned various bank stocks. It also raised cattle and dealt in hides, dry and green. From the circumstance that in one of his accounts the appellee is charged with milk it would appear that they did a dairy business; they conducted a factory of undershirts; they had a poultry farm; they pur-

chased plantations with the capital of the firm, and raised sugar from cane, and pineapples which they exported to the United States.

Shortly after the organization of the appellant firm there was purchased *with firm money* and *on the firm account* the estate of Santa Barbara for the sum of $12,000, and it is classed as an asset to this amount in the general inventory, the first after its purchase, taken April 11, 1904. (See Record, pp. 21, 22.) In this same inventory appear credits of $3,520 for cane which was ready to be ground and which was estimated by them as to amount and value per quintal of expected yield, and there was an item of $5,668.92 as an asset represented by the cost of planting and cultivating certain cane and ratoon cane. Again, in the inventory of November 30, 1905, credit is taken among the assets for the plantation of Santa Barbara and for the cane plantations for 1906 and 1907 (Record, p. 23). This inventory also shows that under this mode of inventorying assets a profit had been estimated of $35,402.45, and that 10 per cent of this profit, $3,540.25, was apportioned to the appellee as cash (Record, p. 24). By reference to the account current (see document No. 1, Record, p. 18), which was the only account which the firm kept with the appellee, he was credited on November 30, 1905, as "appertaining to him for profits of 10 per cent on $35,502.45, $3,540.25." By reference to this account current, which runs through the whole period of the appellee's employment, it will be observed that, from the date of the first inventory, in 1904, he was continuously credited with his 10 per cent of the estimated profits until 1910 (Record, p. 19). This account current contained credits for salary due and for percentages of profits as estimated by the yearly balances and debits in cash drawn out by the appellee or in stock in trade, which he appropriated for his use. The résumé of the account showed that he had been credited, all told, with $25,365.75, being $12,180 for salary from October 15, 1902, to January 15, 1910, and profits as per balances, $13,185.75, and that during that

period he had drawn out in cash $17,517.38 (Record, p. 20). In the inventory of 1906 (Record, p. 25) the estate of Santa Barbara is carried at $16,863.46, and again the planting of cane is treated as an asset to the extent of $13,312.40. Again, the profits are estimated this time at $34,950.03, and the appellee is credited with $3,495, which appears in his account current for 1906.

Sometime in December, 1908, the appellee decided to withdraw from the house and he so informed the senior member of the firm, but was persuaded to stay, and in 1909 was again persuaded to continue with the firm. In 1910, however, the appellee announced his definite intention of withdrawing, and stated to the head of the firm that the balance sheet of January 15 was, so far as he was concerned, a final accounting, and that he thought that all accounts which would show either a profit or loss should be brought into the balance, including the estate of Santa Barbara and the planting of pines for 1910 and 1911 (Record, p. 56). A difference of opinion at once arose as to whether the estate of Santa Barbara was worth only $60,000 or $70,000 as stated by Mr. Piza or worth $80,000 as claimed by the appellee (Record, p. 67). It was brought out on the cross-examination of the appellee, when called as a witness for the appellants, that before the parties actually got into court Mr. Piza offered to take over Santa Barbara for $60,000 and liquidate the plantations and leave everything else in just the way it was stated in the final inventory (Record, p. 57). Not being able to come to any agreement over the two only points in controversy, first, as to whether the estate of Santa Barbara should be treated for purposes of liquidation of the appellee's interest therein as worth $60,000 as claimed by Mr. Piza or $80,000 as claimed by Mr. Gandia; secondly, as to whether the appellee was not entitled to have the value of the cane and plantings for 1910 and 1911 estimated for the purpose of showing profits in the same way that they had been esti-

mated in previous trial-balance sheets, and without bei obliged to wait until the crops were gathered and sold; t appellee brought his suit in the District Court of Porto Ric

In his complaint the appellee alleged that a general ba ance of the house had been struck on the 15th of January that on the 11th of March the petitioner ceased as an em ployee of the defendant firm and appellee claimed an asce tainment of the profits up to that date, and (Record, p 2)—

> "Eighth. That for the purpose, the petitioner an the defendant firm have agreed to accept, as struc on the 11th day of this month of March, the balanc date January 15th ultimo, without discrepancie other than on two points.
>
> "(*a*) The valuation of the estate named 'Santa Barbara' in the district of Dorado, which is worth, a least, eighty thousand dollars, and the defendant firm insists is worth no more than sixty thousand.
>
> "(*b*) The profit in the cultivations and planting of pines and cane on the said estate Santa Barbara, and of pines on another estate situated in the barrio of Sabana Seca, municipal district of Toa Baja, which are worth twenty thousand dollars, and the defendant firm denies that the same are worth anything at all at present."

Appellee then alleged that there was a balance due him over and above that admitted by the firm's balance sheet by difference in the valuation of the estate—Santa Barbara, of $5,941.53; by difference in cultivation in planting estate of Sabana Seca, $2,000—making a total, with the admitted balance, of $15,358.23.

By their answer the firm of Piza Hermanos answered through Mr. Antonio Piza, as managing partner, and Mr. Francisco Piza, as silent partner. The answer recites that the firm of Piza Hermanos was conducted by the Messrs. Piza under a partnership agreement of October 27, 1902, for five years, which was afterward extended for a further period of five years.

The fifth paragraph of the answer is as follows:

> "5th. That at the time that the said plaintiff ceased to be an employee of the said defendant mercantile firm, a general balance should have been struck to determine his share of the profits, but as a general balance of said mercantile firm had been struck under date of January 15th ultimo, both of the said parties, the plaintiff and defendant, had agreed to accept the said balance, except as to certain points in controversy stated by the plaintiff in paragraph eighth of the complaint."

It was thus admitted that the only point in controversy as to Santa Barbara itself was as to whether it might show a profit dependent on an increase in value to $80,000 or only $60,000. There is not the slightest suggestion that the real value of the estate was immaterial, inasmuch as the Santa Barbara constituted a part of the "permanent plant" or was not the subject of "profit-sharing ownership," or, in short, that an increase in its value from $12,000 to $60,000 was not a profit in which the appellee was entitled to share.

The seventh paragraph of the answer admits that there is due to the appellee 10 per cent of the profits estimated in the manner shown in the inventory for January 15, 1910.

In the eleventh paragraph of the answer occurs the following language:

> "11th. We set forth herein that it is not true that the defendant firm has not wanted to estimate the estate Santa Barbara at a nominal value of eighty thousand dollars for sale to a third party. What the defendant company has refused to do has been to purchase the said estate for that amount to the end that the plaintiff herein may profit by receiving in cash his share of the profits on the said estate to the prejudice of all other participants therein" (Record, p. 7).

Here, again, the contention is not that appellee is not entitled to his 10 per cent of the increase in value of Santa

Barbara, but denies his right to have his percentage credited to him in cash. This attitude is quite consistent with the claim made in paragraph 2 of the answer (Record, p. 6) that the appellee was bound by the articles of association, under the terms of which he should take his percentage in "cash, accounts, and property."

The twelfth paragraph alleges that the real objection of the defendants to the claim of the plaintiff in the suit below was to make a liquidation at that time for the benefit of the plaintiff.

The Court of First Instance, sitting without a jury, found, at page 8 of the record:

> "4. That for the purpose of liquidating the profits accruing to the plaintiff at the expiration of his contract both of the parties litigant agreed to accept a certain general balance that at that time was being prepared of the operations of the house, which was to bear date of January 15th of the current year, without any points of discrepancy other than the valuation of the estate, Santa Barbara, which is a part of the capital of the firm, and the valuation of profits on the cultivations and plantings on the said estate and on the estate of Sabana Seca."

The court in its opinion stated the differences between the parties and the questions submitted for judicial determination to be three, as follows:

> "1st. In which form is the plaintiff to receive the 10 per cent of the profits; the plaintiff maintaining that it should be in cash and the defendant alleging that it should be proportionately in cash, stocks, accounts, and other property of the firm, pursuant to a certain clause in the instrument of articles of partnership of Piza Hermanos, S. en C.
>
> "2nd. The valuation of the estate Santa Barbara which is estimated by the plaintiff at $80,000 and by the defendant at $60,000.
>
> "3rd. The valuation of the profits on cultivations and plantings at Santa Barbara and Sabana Seca,

estimated by the plaintiff at $20,000 and which, according to the defendant, are of no value at all on the date of the claim."

Passing upon the first point, the court finds from all the evidence that it has not been shown that the appellee was an industrial partner of the firm of Piza Hermanos, but, on the contrary, was merely an employee; the court further finding that the defendants themselves, under their allegations and under the instrument of partnership, acknowledged that the appellee was no such partner, but merely an employee and attorney in fact. Says the court:

"Moreover the testimony as to this point leaves no doubt whatever as to the capacity of Mr. Gandia in the said firm" (Record, p. 9).

The court further finds as a question of fact:

"That no proposition was made Mr. Gandia and no agreement entered into with him that the profits were to be distributed in the manner alleged by the defendant, which is the same as set out in one of the clauses of the instrument of partnership of Piza Hermanos, S. en. C."

The court finds that Mr. Gandia did not impliedly accept the terms of said agreement; that he had a verbal contract to the opposite effect; that that contract contemplated that the balances should be struck in the manner in which they were struck during the years 1904, 1905, and 1906, subsequent to the instrument of partnership, and that during all that time he was credited with 10 per cent of the estimated profits in his account current with the firm and allowed to draw against it as a cash balance (Record, p. 10). The court in its opinion finds it quite natural that Gandia continued as an employee in spite of the clause mentioned in the articles of partnership, and did not protest against that clause because he was not a party to the instrument; he had a different contract to which he was a party with the firm; he

did not learn of the contents of the articles of partnership until some months after his employment had begun; that Mr. Piza was for the most of the time away, and, lastly, the firm was treating him in the actual balances struck in the manner agreed upon between himself and the firm and which was satisfactory to him (Record, p. 10).

With respect to the second point, the Court of First Instance construed paragraph five of the appellants' answer as a judicial admission that the plaintiff's statement in his complaint, that the point of difference between them was as to whether the estate of Santa Barbara should be taken at $60,000 or at $80,000, was correct. In light of this the court took the view—

> "That the discussion on this point, therefore, is as to whether or not the value of Santa Barbara is $60,000 as averred by defendants or $80,000 maintained by the plaintiff."

The court itself finds that the acquisition of Santa Barbara was made after the inventory of 1902 (which was the initial inventory of Piza Hermanos S. en C.), and was "only one of the many transactions engaged in by the said defendant firm."

Attention is called to the testimony of Servando Pico, a witness for the defendant, who stated:

> "That the said estate appears in the accounts of the house the same as any other account, that it was acquired with the capital of the firm and in due course of business of the said firm in November, 1902" (Record, p. 11).

The court then finds as a fact that the estate was worth more than $60,000 on the date the plaintiff ceased to be an employee of the defendant firm. The court further finds as a fact from the testimony in the case that the appellants themselves had placed in the inventory of 1907, a value of $70,000 on the estate, because that was the value at which

it was estimated by the defendant firm, and not, as was suggested, for the purpose of deceiving creditors in the United States (Record, p. 12). The court further finds that the actual value of the estate of Santa Barbara was more than $80,000.

Referring to the third point of controversy before the Court of First Instance that court finds as a fact that the appellee was nothing else than an employee of the appellant firm; that his compensation ceased when he left the firm, and that therefore plantings and cultivations should have been liquidated then, for the purpose of the balance sheet, so as to know the amount of his 10 per cent thereon. The court finds that the novel form of entries used in the balance of January 15, 1910, were made subsequent to the appellee leaving the firm, and that these entries, from which it would appear that the plantations of cane and pine were not to be regarded as assets until the product had been marketed and sold, was a departure from the firm's previous mode of carrying these items, and "was done in consideration of the differences arising between both as to whether or not the same should be appraised for liquidation" (Record, p. 13). In the entry of January 15, 1910, there was a statement that the valuation upon the growing products was made pursuant to such results as might be shown when the crops were gathered and sold. But this entry in the books the court finds as a matter of fact was not made at the time the appellee was serving in the house, but subsequent to his leaving; for, though the balance sheet is of date of January 15, when he left the firm March 11 the general balance was not finished, nor a clean copy made on the books of the results thereunder (Record, p. 13).

The court further finds that the crops were worth the amount claimed, and a great deal more. And the court, therefore, gave judgment to the appellee for the full amount claimed.

This judgment, together with the pleadings and evidence, was carried up to the Supreme Court of Porto Rico, in which

were urged seven assignments of error, and being there affirmed was appealed to this court. The seven assignments of error in the Supreme Court of Porto Rico have been enlarged into ten. A special finding of facts has been filed, which coincide with the facts stated in the opinion of the District Court, the court of first instance.

First Assignment of Error.

This assignment of error is evidently based on the contention that the estate of Santa Barbara should not have been treated as an ordinary partnership asset; that it was part of the "permanent plant," which was to produce profits; that it was in no sense a "vendible commodity," like ordinary mercantile stock in trade; that if it were itself sold at a profit such profit would belong exclusively to the two partners, and that the estate therefore did not constitute a proper item to be included in the annual balances upon the basis of which the appellee's 10 per cent of the profits were to be estimated.

This contention might properly have been disposed of even by the Supreme Court of Porto Rico on the ground that the point was not raised before the court of first instance, and that it was not proper to ask an appellate court to reverse the action of the lower court upon a proposition which was not urged before it. That this view of the relation of the parties to the estate of Santa Barbara was purely an afterthought of counsel, and never the subject of difference of opinion between the parties prior to the litigation, is apparent from the formal answer of Mr. Antonio Piza, a managing partner, made before the notary public, Gonzales, on the 12th day of March, 1910, to the formal demand in writing made by the appellee upon the appellant firm. After stating that he was conversant with the terms of the formal demand made by the plaintiff (see document No. 11, Rec., p. 48), he says):

> "As to the first part thereof that he is willing to comply strictly with the agreement in clause seventh

of the instrument of organization of the firm Piza Hermanos S. en C., namely to deliver to Mr. Gandia his 10% of the net profits, after a proper inventory has been taken, in such property as the said net profits may consist, that is to say, 10% of such amount as may be on hand in cash, 10% of such amount as may accrue from outstanding credits, as the same are collected, and a 10% of the total value of the real estate entering into such net profits as well as such stock or merchandise of the firm as may result, and which is also comprised in the said net profits. * * * And Mr. Piza states further that the liquidation of net profits shown in the balance and which are represented by real estate and merchandise is to be made by the firm of Piza Hermanos, according to law." (See document No. 12, Rec., p. 48.)

Apart from the effect of this statement as an admission that the estate of Santa Barbara was to be treated as an ordinary asset of the firm, it throws light upon the judicial admission contained in the fifth paragraph of the defendant's answer, which admits that the only controversy that existed between them was whether the profit on the purchase of the estate of Santa Barbara was to be figured on a basis of its being inventoried at $60,000 or at $80,000.

The trial justice proceeded, as his opinion will show, upon the theory that this was admittedly the only point of difference with respect to the estate of Santa Barbara itself. The evidence that was introduced by the plaintiff below to prove the issues raised by the pleadings, while it quite incidentally served to demolish this contention, which was afterwards raised for the first time in the Supreme Court of Porto Rico, an appellate tribunal, was not introduced for that purpose, but only as bearing upon the suggestion contained in the defendants' answer to the plaintiff's demand hereinabove referred to and his answer to the complaint, wherein it was insisted that the plaintiff was not entitled to his share of the increment in the value of the estate of Santa Barbara *at once and in cash*, but, on the contrary, was obligated by the seventh

clause of the instrument of organization to await the final liquidation of the firm's assets and take his ten per cent in accounts and in property as well as in cash. It is respectfully submitted that it is not competent for parties litigant to enlarge or change the issues which they have raised by their pleadings while their review is pending in an appellate tribunal.

To the brief filed in opposition to the appellee's motion to dismiss this appeal as frivolous and taken for delay only, the greatest reliance was placed upon this point, and it was urged that the plantation of Santa Barbara was not stock in trade of the firm, but like the good-will that the house had built up or like a plant necessary to the conduct of a business. The contention was made that if the firm business had been the purchase and sale of lands, that then any increment in value of the Santa Barbara estate would have constituted a part of the earnings upon the stock in trade. The point was also urged that no part of the appellee's capital went into the purchase of Santa Barbara, but that the purchase price, as well as the improvements, were charged against the capital account of the two partners. So far as the latter suggestion is concerned, it would have applied equally well to any sort of stock in trade with which the firm might have started as a result of the investment therein of the capital contributed by the two partners, who alone had the right or privilege to contribute capital to the firm. It would seem that if the appellee was entitled to a 10 per cent profit, based on the difference between the purchase price of boots and shoes, in which the capital of the firm had been invested, he would be equally entitled to a difference between the purchase price and the actual value of the Santa Barbara estate, purchased in the same way, although, of course, in neither case would any of the capital of the appellee have been invested. If the appellee was not to have his profits in those things in which the capital of the firm was invested, rather than his own, then he would never have been entitled to any profits whatever.

It so happens, however, that the position that the Santa Barbara estate is in some other and different situation as an asset from that of the other assets of the firm, is directly contrary to all the evidence in the case.

Certainly an estate upon which pines and cane are to be raised is no more a plant as distinguished from stock in trade than is the machinery used for manufacturing undershirts. Yet, in the case of the shirt factory, the appellants made no objection to including in the different inventories, upon the balances of which profits might show, the machinery and apparatus by which the products were manufactured. (See Record, p. 21.) The same contention might have been made, but was not made, with respect to the cattle, whose milk was sold by the firm, or as to the shares of stock, upon which dividends were received, or with respect to the poultry farm, where eggs were marketed. In the case of the stock in the Spanish Bank the appellants made no difficulty about agreeing that it was worth on the market $45 a share instead of the $30 at which it had previously been inventoried, and the difference in value was conceded by them to be a profit in which appellee shared (Record, p. 56). Of course, the reason for wishing now to withdraw the estate of Santa Barbara from the general assets and stock in trade of the appellant firm is on account of the exceptional profit which the evidence disclosed the firm had secured from this purchase. It was not because this estate represented profit-producing plant any more than any other portion of the assets. The court below, at page 70, says:

> "It seems to be forgotten that this estate was purchased at a low price and that the plaintiff himself, as agent of the firm made the offer and secured the bargain."
>
> "And, in the business of such a firm as that of the appellants, conducting various mercantile establishments, sugar plantations, pineapple farms and dealing in real estate, all sources of profit are properly included in the balance sheet when estimating the net profits derived from the business. In the inven-

tory of 1902 of the stock belonging to the company or firm of Piza Brothers the plantation Santa Barbara does not figure as part of the capital of the said firm because the acquisition of said plantation took place later on and was one of the many transactions to which the aforesaid firm devoted itself in the regular pursuit of its business.

"This is also proven by the testimony of Servando Pico, a witness for the defendants, who testified that said plantation figures among the accounts of the firm the same as any other account; that it was acquired with the capital of the firm during the course of their transactions in November, 1902" (Record, p. 75).

The fact that the estate of Santa Barbara was purchased by the firm after the contract with the appellee was made, instead of being contributed by the firm as part of the firm's capital at the commencement of business, has an important bearing upon what might be presumed to be the intention of the parties. The inducement to the appellee to serve the appellants was, in addition to his fixed salary, his right to participate in the profitable employment of an original capital of $61,000, represented by the assets of the old mercantile house of Piza Hermanos, and consisting of cash and vendable commodities of the most varied sort. As is well known, wholesale and retail dealers in merchandise turn over their mercantile assets sometimes three and four times a year, making a profit in each turning over. Had the estate of Santa Barbara been contributed by the appellants as part of the profit-earning capital of the firm, with the understanding, express or implied, that the net profits upon the plantations carried on on the estate were to constitute the sole profits upon the employment of that portion of the capital, then undoubtedly the appellants' contention would have some foundation. Such, however, was not the case, and there is nothing upon which to base even a presumption of assent. At the time the appellee accepted employment the capital consisted entirely of cash or vendable commodities, in the turn-over of which the appellee was to share.

It would have been a fraud upon the appellee should the appellants have attempted to withdraw any portion of the contributed capital from the ordinary mercantile business in which the parties were engaged. If it be true, as is now urged by the appellants, that the purchase of this real estate with the firm's capital was with a view to withdrawing that capital from investment in vendable commodities and using it as a basis of an agricultural enterprise, in the ordinary sense of the word, then the basis of the appellee's employment with the appellants was changed, and if this was done without his consent it constituted a violation of good faith and a breach of his contract of employment. The fact is, however, as the court below found, that the appellee himself discovered this bargain and purchased with the firm's capital an estate for $12,000, which the testimony shows that eight years later the members of the firm were not anxious to sell for $100,000 (Record, p. 37).

Suppose the managing partners had decided that it would not be profitable to cultivate cane and pines upon the estate Santa Barbara, can it be contended for a moment that they would have the right to hold this estate, which locked up nearly a fifth of the entire capital of the firm, for a rise in value and subsequent sale at an enormous profit, and assert that the appellee was entitled to no part of this profit because the firm was not primarily organized to buy and sell real estate, but only did so occasionally when a great bargain could be secured for it by one of its agents interested to the extent of 10 per cent in the profitable investment of its capital? Is this situation in anywise altered by the fact that the managing partner decides that further capital of the firm shall be invested in the estate for the raising of cane for sugar and of pines for their sale in the American market? The whole vice of the appellants' argument is disclosed in a simile to be found in the appellants' brief in opposition to the motion to dismiss. There the estate of Santa Barbara is compared to a "loaned horse," in the profitable employment of which two persons agree to share in certain fixed

percentages. The estate of Santa Barbara was not a "loaned horse," but was purchased, not exclusively with the capital of the appellants, but also, so far as the profitable employment of the capital was concerned, to the extent of 10 per cent, at least, with the capital of the appellee. The profit on the estate of Santa Barbara is described by counsel for the appellants as a potential thing, not as an actual profit, and it is suggested that it is only in actual profits that the appellee was entitled to share. This construction accords neither with the contract testified to by the appellee and found by the court to be the real contract between the parties nor with the written articles of association by which the appellants contended in the two lower courts that the appellee was bound. By both contracts the amount due the appellee was not to depend upon the actual profits as disclosed by a complete liquidation of the firm's business, but was to be estimated on the basis of inventoried assets, and if it is possible to inventory a herd of oxen or a given number of yards of silk in advance of their actual sale, it is equally possible to inventory the estate of Santa Barbara at the proper value at which it should be carried in the firm's balance sheet. If labor and materials expended on the estate could be carried as an asset, as was regularly done, to that extent taking the place of the diminution in the firm's capital so occasioned, and which capital might have been otherwise profitably employed, there was certainly no insurmountable difficulty in the parties agreeing that the estate constituted an asset of at least the value of $80,000, especially in view of the firm's disinclination to sell it to Mr. Waymouth for $100,000 (Record, p. 37, folio 43).

In the brief of the appellants in opposition to the motion to dismiss it is stated:

> "The appellant contends that the venture was entire; that this promise was conditional upon the reaping of profit; that profit was to constitute the net result, not the favorable prospects of one day, while the blights and dangers of a succeeding one were to

be weathered. It contends, also, that the arrangement implied a reciprocal on the part of the employee to remain until the results could be measured, could be ascertained."

And again,

> "It cannot be contended that the profit in Santa Barbara was more than potential, and if the possible profits of calico, embroideries and shoes are not to be taken into account why the contrary with respect to something that was not bought to sell?"

The use of the word potential profits is misleading. What the contract between the parties contemplated was a cash payment to the employee of 10 per cent of "estimated" profits. The fact that the profits were to be estimated necessarily excludes any necessity that they should be actual in the sense of demonstrated profits, profits which had resulted from a completed transaction, or, as the appellant metaphorically expressed it, a profit that had been actually reaped. It certainly will not be contended that the parties did not have the right to substitute estimated profits for reaped or resultant profits if they wished to do so. It certainly cannot be contended that the agreement between them contemplated anything but an estimated profit. The agreement itself points out the way in which the profit is to be estimated. It is to be done by inventorying the assets and liabilities of the firm at the beginning and at the ending of the profit-sharing period, and the increase, if any, shown by the balance is to be treated, for the purpose of statement with the appellee, as a net profit of which he is to have 10 per cent, in cash, as he contended, and in cash, accounts and property, as contended below by the appellants. There is nothing in the record to disclose exactly how particular items of property were inventoried, for instance, whether calicos and embroideries and shoes which were on hand at both the beginning and the conclusion of the profit-sharing period were to be both times carried at cost price or whether depreciation or appreciation

in the value of certain portions of the stock were conside
in estimating their value at the time of inventory. It m
be that in taking the inventory the various items belongi
in the asset column were carried at the then market valu
which may have been more, or less, than the cost price, a
equal to, or less, than the firm's selling price. In the a
sence of any enlightenment upon this subject from the reco
it may be assumed that these various estimates of value we
made in the manner that was usual for mercantile houses
figuring their ledger assets. One thing is certain, that wha
ever the mode of estimating the value of the personal pro
erty items that went into the accounting it was quit
satisfactory to all the parties concerned, except in the case o
the stock in the Spanish bank, which was inventoried at $3
a share until the appellee called the attention of the firm t
the fact that its market value at the time of the inventory
was $45 a share, and the latter figure was at once used as the
proper one in the accounting (Rec., p. 56).

As we have seen, the mode in which profits were to be esti-
mated was made the subject of distinct agreement between
the parties, but there is nothing in the record to disclose the
mode of ascertaining the figure at which the various items
that went to make up the account was to be arrived at. In
the case of the estate of Santa Barbara, its value was to be
estimated, and it must have been within the contemplation
of the parties that if they could not agree upon an estimate
that some means must be employed to arrive at its real value.
The method actually used by the plaintiff below was the usual
one for establishing the market value of real property which
is in dispute—that is to say, by the testimony of properly
qualified expert witnesses. Whether that is always satisfac-
tory is questionable, but it is certainly the only practical way
possible where such a fact is in issue and the parties disagree,
and it is noteworthy that no objection was interposed below
either to this mode of fixing the value of Santa Barbara or
as to the sufficiency and qualifications of the witnesses. If

the appellants had known of any more equitable manner of establishing this fact, it was their duty to have advanced it in the lower court and to have given the trial justice an opportunity to rule upon it. It is certainly too late to raise in an appellate tribunal a question of this character.

The best guide for the interpretation of the contract of employment is the conduct of the parties in regard to it. While it is true that the findings of fact certified by the Supreme Court do not specifically refer to this point because, as said before, it was an afterthought, the evidence is very clear that the purchase of the Santa Barbara estate was simply one of many varied directions in which the firm's capital was employed and was always treated by the members of the firm and the appellee as a part of the ordinary ledger assets of the concern. In the very first inventory in which appears (Record, p. 21) the estate of Santa Barbara it is carried as a ledger asset to the extent of $12,000, just as the merchandise on hand was carried at a net appraised value of $35,536.99, and all sorts of varied property, real and personal, were inventoried. This is true in every successive inventory. Moreover, it was testified quite distinctly by the appellant's own witness as follows (Record, p. 61, folio 76):

> "The estate Santa Barbara figures as any other account; the estate of Santa Barbara was acquired with the capital that the firm had. The firm was established with merchandise and accounts, and in the course of its business Santa Barbara was acquired with the firm's capital in November, 1902; since that date Santa Barbara appears in the assets of the house of Piza Hermanos as any other account of merchandise or of any other business."

This witness, Mr. Servando Pico, was at the time he testified and for many years previously had been an employee and attorney in fact of the appellants, and is a witness of the appellants. His testimony stands without denial and is moreover supported by the inventories of the firm, which were part of the evidence before both of the lower courts.

Again, nothing could be more conclusive upon the statu of the Santa Barbara estate as being in the same categor as any other account than the fact that the appellants neve questioned its so being until appeal was taken to an appel late court. When the appellee and appellants agreed t accept the balance sheet of January 15, except as to tw items, the only point of difference between them with re spect to the Santa Barbara estate was as to whether the appellee was entitled to have it taken at $80,000, which he claimed to be its then true value, or whether it should be taken at $60,000, as asserted by the appellants. There was no question whatever as to the fact that it should be treated as an element in the account, but only as to how much in dollars it should be estimated to be worth for purposes of the accounting. Mr. Gandia testifies to this (Record, p. 57), and neither of the appellants attempted to deny the statement as to what had been agreed upon between him and them. Moreover, when the appellee stated in his complaint to the Court of First Instance, in paragraph eight thereof—

> "(a) The valuation of the estate named Santa Barbara in the district of Dorado, which is worth, at least, $80,000, and the defendant firm insists is worth no more than $60,000."

the defendant, by the fifth paragraph of his answer, judicially admitted that the appellee had correctly stated the point of controversy in the eighth paragraph of his complaint. Again, in the eleventh paragraph of his answer, wherein the defendant states the reasons why he does not wish the plaintiff to have credited as profits 10 per cent of the increase in the value of the estate of Santa Barbara, it is observable that this opposition is not based upon any alleged difference between the estate of Santa Barbara and the other property of the firm, but is based upon the refusal of the appellants—

> "To purchase the said estate for that amount to the end that the plaintiff herein may profit by receiving in cash his share of the profits of the said estate to the prejudice of all other participants therein."

This position is made plain at once by a consideration of the main contention of the appellants as set out in their answer and as set forth in the seven assignments of error in the Supreme Court of Porto Rico. What they claimed was that the appellee was bound by the provisions of the instrument of partnership of October 27, 1902, by the terms of which in case of withdrawal or discharge by the managing partner the retiring employee was obligated to take his percentage of the profits—

> "In cash, stocks, accounts and other property of the firm" (Record, p. 6).

In other words, as is clearly shown by the effort to have the court find that the appellee was an industrial partner (see 3d Finding of Fact by the Supreme Court of Porto Rico, Record, p. 84), it was the desire of the appellants to force him to await the liquidation of all of the affairs before he was to be entitled to receive his 10 per cent of the profits. That court having decided against the appellants upon this contention, whereby the appellee would have had to await the liquidation of the firm's affairs before he was to receive his percentage of the profits, it was decided to shift the ground before the appellate tribunal, and, in spite of the agreement between the appellants and the appellee, and in spite of the admissions of the pleadings, and in spite of the testimony taken, to raise an absolutely new question based upon some supposed fundamental difference between the estate of Santa Barbara and the other assets of the appellant firm.

Second, Third, Fourth, Fifth, and Sixth Assignments

These five assignments of error correspond substantially with the first five assignments of error considered by the Supreme Court of Porto Rico. Taken together, all are addressed to the same general contention, to wit, that the courts below erred in finding that the appellee was merely an employee of the appellant firm, entitled to a fixed percentage of the profits as a measure of compensation and entitled to have those profits estimated on the basis of the previous year's earnings, and in finding that his status as an employee was fixed by a personal and independent contract between himself and the appellants and that he was in nowise affected by the terms of the articles of partnership to which he was not a party and to which he never assented, either expressly or impliedly; whereas the courts below should have found that the appellee was an industrial partner, under the provisions of the Code of Commerce of Porto Rico, and that the real terms of his employment were as fixed by the articles of copartnership and not otherwise.

The appellee would have a right at this point to invoke the well-settled rule of law in this court laid down in numerous cases that—

> "Upon a review of a judgment in a case not tried by a jury and taken by appeal from the Supreme Court of a Territory this court will limit its inquiry as to whether the findings of fact made by the court below support its judgment. County of Apache, appt., *v.* Julia Barth, Executrix of Jacob Barth, deceased, 177 U. S., 542. (See George W. Greyson, et al., appts., *v.* George Lynch, et al., 163 U. S., 468; Bear Lake and River Water Works & Irrigation Company et al., appts., *v.* William Garland, et al., 164 U. S., 1; Adelia Young et al., appts., *v.* Jennie Amy, 171 U. S., 179.)"

The fourth finding of fact (Record, p. 86, folio 115) is as follows:

> "That upon the organization of the new firm of Piza Hermanos, S. en C., the said Ricardo Gandia, plaintiff herein, agreed with the managing partner of the said firm, Mr. Antonio Piza, to be general attorney-in-fact for the said firm with a monthly salary of $140.00, and besides, 10 per cent of the net profits, which was to be credited in his private accounts."

This finding of fact fixed the status of the appellee as an employee and not as a partner in any sense of the word unless such a contract was one which under the law of Porto Rico would make him a partner. Even if the latter were so as between the parties themselves the appellee would have had a right to have his profits estimated from time to time and credited to his private account. Credited to his private account unquestionably meant a cash credit, against which he could draw in the same manner that he drew against his salary. Here was an employee whose salary was to consist of a fixed sum and a fixed percentage, which percentage was to be credited as cash in his account with the firm and against which he was to have the right to draw. Of course, it was never contemplated by the parties that there was to be a complete liquidation of the firm's affairs in order to determine the ultimate profit or loss upon each specific transaction before any credit was to be made to the private account of this employee. A mere glance at the private account of the appellee, which is set forth on pages 18 and 19 of the record, shows exactly what the parties understood by this contract, and shows his 10 per cent being each year credited and him drawing against it as a cash item. The appellee has no desire to take advantage of any restriction upon the power of this court to review this controversy entirely upon its merits, and to that end invites a consideration of the testimony upon which the finding of fact was predicated.

The first, second, and third findings of fact show that the appellee was an old employee of the house of Piza Hermanos,

of which he had been for seven years clerk, correspondent, bookkeeper, and, lastly, attorney in fact. On October 27, 1902, the appellants formed a new firm as a successor of the former commercial firm of Piza Hermanos. The articles of association, set forth in full on pages 53 and 54 of the record, show that the instrument in question was executed by Mr. Antonio Piza, acting for himself and as attorney in fact for his brother, Mr. Francisco Piza, the other partner. The agreement itself states who the partners are, and the appellee and a Mr. Pico are expressly referred to as employees. Upon its face, therefore, this instrument discloses that the appellee was an employee merely and in no sense intended to be a partner, industrial or otherwise, and further reveals that his right of participation in the profits was intended merely as a measure of compensation. This is clear from the statement that he may be discharged from employment whenever it shall be convenient to the managing partner to do so. This is a provision inconsistent with and little likely to be found in a contract of copartnership. In this agreement it appears that in case of withdrawal by the appellee or his discharge he should have his share of the profits delivered up to him in cash, stocks, accounts, and other property of the firm as shown by a balance sheet. It appears, therefore, that the only reference made to a balance is in connection with the withdrawal or discharge of the appellee. There is not a word as to any other balances being struck periodically from which to determine at convenient intervals the amount due the appellee. It is quite clear from this instrument, which in fact was a unilateral statement of intention rather than a contract of partnership, that the appellee need not wait until the final expiration of the firm, either by its own limitations or by the action of the managing partner, to whom was reserved the right of terminating it at any time, for his 10 per cent of the profits; but that his 10 per cent of the profits should be estimated by a proper balance, and that he was then to have 10 per cent of the profits shown

by such balance handed over to him partly in cash and partly in stock in trade or partly in accounts due the firm. Had this agreement been assented to by the appellee he would have had a right to so much of the estate of Santa Barbara as represented 10 per cent of its increase in value and so much of the merchandise and of the accounts due the firm as would together make up his 10 per cent of net profit upon the remainder of the firm's business. Even this would not have justified the appellants' contention, made for the first time before an appellate court, that the appellee would at no time be entitled to any part of the profits on the estate of Santa Barbara, nor yet the contention set forth in the other assignments of error that he would have to wait until the final liquidation of the sugar and cane plantations upon the estate of Santa Barbara before he should have any part of the profit on these transactions. While under it he would have been compelled to accept part at least of his profits in kind instead of in cash, this agreement clearly anticipated that if he withdrew—for instance, six months after the commencement of the firm—that he should be entitled to have a balance struck then and there, and if the balance showed a profit to have 10 per cent of it in cash and kind. This is quite a different thing from the present contention of the appellants, that the appellee is bound by the terms of these articles of copartnership, but is entitled to no part of the profits on the estate of Santa Barbara in any form whatever or at any time, nor to his share of the profits in the cane and sugar plantations until the firm has wholly or in part liquidated its affairs.

It is quite clear, however, that the appellee never did consent to the provisions in the articles of copartnership, either as a party to the contract or by reason of his conduct in continuing with the firm with a knowledge of these provisions and a knowledge that the firm considered him as being in their employment under the terms and conditions mentioned in the articles of copartnership.

The fourth finding of fact is conclusive upon this point and is supported by all of the documentary evidence and by the uncontradicted testimony of the plaintiff (Record, p. 10):

> "That the only agreement existing between the plaintiff and Mr. Antonio Piza was that he was to receive for his services to the house $140 monthly and, besides, 10 per cent of the profits, and that no proposition was made to Mr. Gandia and no agreement entered into with him that the profits were to be distributed in the manner alleged by the defendant, which is the same as set out in one of the clauses of the instrument of partnership of Piza Hermanos S. en C."

The District Court supports this finding (Record, p. 10) upon the testimony of the plaintiff, which, it is to be observed, was not attempted to be contradicted by the appellants, although it concerned an alleged agreement between the plaintiff and the defendants, and upon the fact that in the inventories made during the years 1904, 1905, 1906, 1907, and 1910 Mr. Gandia was treated by the appellants consistently with the rights claimed by him under the verbal contract to which he testified and inconsistently with the manner called for by the articles of copartnership. The court calls attention to the account current of the appellee, from which it appears that after each balance he was credited in the appreciation in the assets of the firm with his 10 per cent as a cash credit, against which he had the right to draw and against which he did draw at will. As to the appellee being bound by some supposed assent to the terms of the instrument because he made no specific protest against its terms, this is found under the circumstances to have been reasonable. Mr. Piza (Record, p. 10, folio 16) was not in Porto Rico, and on the other hand a balance of the house was struck immediately upon his return, and says the court (Record, p. 10, folio 16):

"As the 10 per cent of the profits were credited to Mr. Gandia in cash in his account current and not as stated in the clause of the instrument of partnership proportioned in property of the firm hence that he had no objection to make to that clause in as much as the contract with the firm had been complied with.

"As a résumé of the above we come to the conclusion that Mr. Gandia is entitled to his profits, not in the form alleged by the defendant to be proportioned in all kinds of property, but to be credited and paid in cash upon the striking of balances."

The appellants, finding that their position was untenable in so far as concerned the court's finding that the appellee was bound by the terms of the articles of co-partnership, and perhaps realizing that, even had he been bound by the terms of these articles, he would have had a right to an immediate balance, showing profits and an immediate payment in cash, accounts, and property of the firm, ingeniously sought to have the court find that the appellee was an industrial partner, as provided by section 288 of the Code of Commerce of Porto Rico, and in this way deprive him of the benefit under either contract. This section provides:

"If the principal has permitted the factor to take part in some transaction, the participation of the latter in the profits shall be, unless there is an agreement to the contrary, in proportion to the capital he may have contributed, and should he not have contributed any capital, he shall be considered a working partner."

In the first place, it is clear that this section contemplated a single transaction, and by the words "unless there is an agreement to the contrary" did not intend that it should override or color a different form of relationship resulting from contracts such, for instance, as that merely of principal and factor in case the parties had so agreed. The consideration of the factor as an industrial partner, where he contributes no capital, was in order to establish his right, in the absence of agreement, to a part of the profits. The section

does not say what that part shall be where the factor contributes no capital but work only, but he is nevertheless to share in the profits, and share in them as a partner, unless it is otherwise agreed. He was to be considered only as an industrial partner, for the purpose of fixing his right to a share of the profits where no agreement as to his share of the profits existed. But here the appellants find themselves in the dilemma that the share of the profits which the appellee was to have was fixed, and fixed by agreement, and whether we consider that agreement as the verbal contract testified to by the appellee or the written articles of partnership, the status of the appellee is equally fixed by definite agreement.

Several references are made to the statute law of Porto Rico. These were considered by the appellate court below in the following portions of the court's opinion:

> "And it is admitted, in his brief and argument, by the distinguished counsel for appellants, that plaintiff was an employee of the defendants, but he claims that he was also an 'industrial partner' by force of the statute law on that subject. In making this claim counsel overlooks the provisions of section 1224 of the Civil Code which settles the question adversely to appellants." (Rec., p. 73.)
>
> "Second. Should the court in its judgment have considered the respondent as an industrial partner of the appellants' firm and not merely as an employee? The appellants admit that the respondent was an employee but they claim that he was at the same time an industrial partner, and should have been treated as such in the trial of this case and the rendition of the judgment from which this appeal was taken. Let us see what the law regards an industrial partner to be. Surely he is a partner of some sort and must have that status before he can be classified as industrial, special, general or otherwise. A partnership according to our Civil Code (section 1567) is 'a contract by which two or more persons bind themselves to contribute money, property or industry to a common fund with the intention of dividing the profits among themselves.' To the same effect are articles 116, et seq. of the Commercial Code. And when real property is contributed

by one of the partners the partnership must be established by a public instrument. (Section 1569 of Civil Code.) The partnership of Piza Brothers, in this case, was formed by such an instrument. But the respondent was not a party to it, he did not agree to the making of it nor sign it, nor even see it until months after it was made and registered. How could he be a party to a written instrument of whose very existence he had no knowledge? And it is prescribed explicitly in our Civil Code (section 1224) that contracts, for partnership as well as others, are only valid between the parties who execute them. Besides in the written contract of partnership of the appellants in the single clause where the respondent is mentioned he is termed an employee and not a partner. Then the plaintiff, not being a signer of the written instrument, was not bound by the partnership contract and was not a partner of the firm of Piza Brothers, industrial or otherwise."

The definition of a partnership under section 1567 of the Civil Code is substantially the same as that of our common-law definition, which makes the sharing of profits, *qua* profits or *as principal*, the essential test. Not only was the appellee not a contracting party to any agreement which could be construed into a partnership agreement, but the only partnership agreement subsisting between the members of the appellant firm was one that in express terms denied to the appellee the character of partner, and fixed him with the status of an employee, liable to discharge at the sole will and pleasure of the managing partner. The entire course of dealing with the defendant shows that he was not a partner. Mr. Pico, the principal witness for the defendant, testified (Record, p. 61):

"Upon the striking of a balance the profits accruing to Mr. Gandia were entered into his account, the account Mr. Gandia had, but 10 per cent had accrued to him on the profits shown by the balance. The expression used in the inventory book that says 'capital account' means the one appertaining to the partners of the house. Mr. Gandia was considered to be an

> employee of the house like myself. The capital account appertained only to Antonio Piza and Francisco Piza, who are the only partners of the house. In the account of Mr. Gandia there is no capital account. He appears only as an employee of the house; as attorney-in-fact of the house. There was no account of Ricardo Gandia other than that in which he was credited and charged with what he drew."

Of course, the purpose in seeking to have the court find that the appellee was a partner was to justify the contention of the appellants that is summarized in the fifth assignment of error, to wit, that he should have been required to wait until the transactions of the firm were completely liquidated in order to show whether he had or had not a profit in the real estate or in the plantations of sugar and cane. But this is directly in conflict with the provisions of the articles of copartnership, by which the appellants say that the appellee was bound. The only sort of liquidation contemplated by that agreement was one by striking a balance which would either show an increase or diminution in the assets of the firm and if the former would entitle the appellee to 10 per cent of the increase as profits, "in accord therewith." How long after the managing partner saw fit to discharge him was the appellee to wait for the liquidation of the firm's business. Was he to have the right to compel a liquidation of all of its affairs in order that an absolutely accurate estimate of profits could be arrived at? Surely it will not be contended that it was to be in the power of either of the two employees to withdraw at will from an important commercial partnership formed for a period of five years, and upon withdrawal require a liquidation of all of the company's business. What is true of growing cane or pineapples on the estate of Santa Barbara is equally true of boots and shoes and hides and cattle; they might or might not at some future period be sold at more or at less than the amount at which they were estimated in the firm's inventories. On the other hand, could it be seriously asserted that either of these

employees might be discharged the very next month after the organization of the copartnership and then be required to wait until the five years for which the firm was formed were up and a general liquidation had taken place in order to ascertain with certainty the net profits or losses of the firm's operations? This is so unreasonable that even had the court below ignored the evidence of the defendant's own books of account, covering a period of eight years, defendant must have found that the plaintiff was not—

> "Bound to wait until the termination, in the manner most convenient to the common interests of all, of the results to be had from the fields and plantations then pending, and that until such thing should happen no profits should be liquidated and no part thereof delivered to the said plaintiff, pursuant to section 225 of the Code of Commerce of Porto Rico." (V. Assignment of Error, Record, p. 84.)

Upon this point, again, it is unfortunate for the appellants that their contention, put forward after a controversy has arisen, was in direct conflict with their previous practice. It needs only to call attention to their own inventories to refute their present contention. The very first inventory taken after the appellee had been with the new firm, that of April 11, 1904, on page 21 of the record, contains, among the list of assets, under the title estate of Santa Barbara, the purchase price of the estate at $12,000 and the following item:

> "Cane to be ground—22,000 quaintals of cane which are approximately ready for grinding as estimated in the said estate of Santa Barbara, representing at 5 per cent, 11 quintals of sugar at $3.20, $3,520.00."
>
> "Planting of cane—cost of planting 100 cuerdas of cane and cultivating 105 cuerdas ratoon cane on the estate Santa Barbara and materials for the said plantation $5,668.92."

On the basis of this inventory, 10 per cent on profits o $8,967.96 were on April 30 carried to the account current o the appellee as a cash credit. At this time there was n assertion by the appellants that the appellee should wait unt the cane had been ground and the sugar sold and the sepa rate disbursements of the firm on account of the sugar shoul be deducted, but he was credited with his percentage of th increase in the assets of the firm. The inventory shows that as against the outlay of the firm's money, all of the firm's assets were balanced off, including not only cane ready to be ground, but even the cost of planting the cane, which would in the future be ready for grinding and which could not be shown from the beginning as an asset in any other way than by taking credit for the actual expense of planting.

It would appear from certain expressions in the brief, filed on behalf of the appellants in opposition to the motion to dismiss, that it is not their intention to insist upon these assignments of error, which depend upon the refusal of the court below to consider the appellee as a partner. After characterizing the appellee as a "quitter," although the evidence disclosed that he had been 9 years with the old firm and 8 years with the new, or 17 years in all with this enterprise, the appellants ask if—

> "A mere underling who was not bound to stay to the end of any week, could force a sale—could force the destruction of the business so that he might share not in the profits of the business, but in the value of the business resulting from its ability to make these profits? That is the case at bar in a nutshell."

Defendants then contended that the appellee has no more right to the increase in value of the estate than any other clerk who has been promised a percentage in the profits of the house. If these varying contentions are to be accepted as valid, the appellee would be in the strange position that as a clerk he is entitled to nothing but his pay and to no participation in the unearned increment or even the earned

increment in value of the unliquidated assets of the firm, while, as a partner, he is not entitled to any pay but only to participation in the net assets after a dissolution of the partnership and a liquidation of its affairs.

Seventh, Eighth, Ninth and Tenth Assignments of Error.

These are substantially the fifth, sixth and seventh assignments in the court below.

Broadly stated, they voice the contention that the court erred in finding that the net profits on March 10, 1910, upon the unharvested and unmarketed crops of pines and cane on the estate Santa Barbara were at least $20,000 and that the appellee was entitled to 10 per cent in cash in his settlement with the firm. The appellants, on the other hand, contend very urgently that as an industrial partner the appellee fell under the ordinary rule applicable to retiring partners and should have waited until the liquidation of the partnership affairs, which would mean in the case at bar until the crops had been harvested and sold. They have also another string to their bow in that the seventh clause of the articles of copartnership provided that if the "employee" Gandia, the appellee, should leave the firm's employment he was to be settled with, not on a cash basis, but in cash accounts payable to the firm and property.

Both of these strings to the appellants' bow have been cut just in two by the findings of fact, fully supported as they are by uncontradicted evidence, all of which was admitted without objection to its competency.

The real grievance of the appellants is against the facts found in the special verdict rather than against the judgment entered upon it.

Stress is laid upon the inequity of the court having found that Gandia was entitled in cash to 10 per cent of speculative and imaginary profits when, as the event showed, the crop was marketed at a loss.

It may be conceded that the method of settlement with the appellee that was here adopted is open to criticism upon just this ground. A variance between actual and estimated profits is very likely to come about, and the event show that one or the other party has experienced a considerable loss. Had the house of Piza Hermanos S. en C. been established for the agricultural exploitation of this and other plantations it is hardly conceivable that the appellee would have been employed upon any terms which would ignore the practical inconvenience of appraising the value of growing crops.

But this side issue was not in existence nor, so far as the record discloses or the probabilities point, even in contemplation when the terms of the appellee's employment were fixed. At that time the business was that of a general mercantile establishment, accustomed to periodical inventories of personal property having a market value. The provisions of the "Instrument of Organization of Partnership" (document 13, Rec., p. 54) disclose just why the parties agreed to an estimation of profits based upon inventories rather than an ascertainment of actual profits through a liquidation of all or any part of the firm's business. Appellee might be discharged at any moment, with or without cause, by the managing partner, and had the right to quit at any time without thereby forfeiting his right to 10 per cent of the accrued profits. In case of such withdrawal was the appellee, or the other employee mentioned, Mr. Pico, to have the right to a dissolution of the partnership and a complete liquidation of its affairs? Obviously not. Under the circumstances the expedient adopted was the only practical and convenient solution of the problem. The profits were not to be fixed by liquidation, but estimated on an inventory basis. Had the firm owned Santa Barbara at that time and growing crops been present in the minds of the parties, it is not unlikely that a different provision might have been made excepting them in some way from the general operation of the method agreed upon.

It is beside the question that Gandia had a separate and somewhat different agreement than the one contained in the instrument of organization of partnership, since both contemplated an estimation of profits rather than a liquidation of the business. The agricultural venture began as an incident to the purchase for twelve thousand dollars of an estate now worth over eighty.

There is no suggestion that there was any express agreement whereby the terms of employment were amended to meet a new condition not in contemplation of the parties when the particular mode of ascertaining profits by inventories was adopted. At best it might be argued that from the very nature of the new venture an assent on the part of the employee to a more usual and practical mode of ascertaining his share of these particular profits might be inferred.

Unfortunately for the appellants they precluded the drawing of any such inference in their behalf by adopting from the first the same method of settlement with this employee during his continuance with them that the court adopted upon his withdrawal.

Attention is particularly called by the court below to this circumstance as one entitled to weight in ascertaining the agreement between the parties.

> "One slight circumstance corroborates the general current testimony which justifies the view contended for by the respondent. It may be mentioned. In striking the balance in 1904 the appellants include in it as part of the cash assets 22,000 quintals of cane which was yet to be ground. The construction which the respondent now contends for, and which was adopted by the trial court was the same which the appellants voluntarily assumed seven years ago." (Rec., p. 71. See also Rec., p. 21.)

In short, the court below has found by evidence, which pointed but one way, that it was the agreement of the parties that the employee was to have his 10 per cent of profits to be estimated on paper by a balance sheet, which, on one

side, should show what the firm began the profit-sharing period with, and, on the other, all the assets at the close of said period, and that among these ledger or inventoried assets the growing crops were to be carried at their estimated value as of the date of withdrawal or discharge.

Such being the agreed mode of settlement there remained only to carry it out when occasion arose. The mode adopted was in accord with the agreement of the parties. The value of the crops were estimated. This could only be done by experts whose opinions are of course fallible and may be belied by the event; and in this connection there are two circumstances worthy of attention. The first is that the experts called were called by the appellee. The appellant called none. Nor did they object at the trial either to the competency of this mode of proof or as to the qualifications of the experts. They contented themselves with insisting that the value of the crops should not be estimated at all. If they were to be estimated they acquiesced in the mode adopted by the trial court. And well they might. I quote from the opinion filed by the trial justice (Rec., p. 14):

> "The expert testimony given has shown that the net production of the said canes on March 11th should be $10,530.00 and of the 110 cuerdas of pines, $44,000.00, which sum of $50,530 represents a valuation much superior to $20,000 at which it was estimated by the plaintiff.
>
> "Consequently as he limited his petition on $20,000, ten per cent of this amount is $2,000 which must be added to the sum of $13,358.23 hereinabove stated by us, and which makes a total value of $15,358.23, which is the same amount claimed in the complaint and which the defendant firm is owing to Mr. Ricardo A. Gandia."

If the experts were right Gandia, by the modest limit put upon his claim, was losing his 10 per cent on the difference between twenty and fifty-five thousand dollars. Even if the

experts appeared to be too optimistic it must have seemed doubtful to the appellants that they could find others ready to swear that these crops were then worth less than half as much as was testified to.

Why then, it may be asked, were the appellants unwilling to settle on the basis suggested by the appellee, and which was apparently unfavorable to him to such a large extent?

The answer to this question may only be surmised from the general attitude of the appellants to the appellee. After fifteen years of presumably faithful and satisfactory service to the house of Piza Hermanos S. en C. he wished to withdraw. He was at once treated as an enemy and as one entitled to no consideration. When differences of opinion arose as to what the firm owed him, he asked that so much at least as was concededly his might be turned over to him for his immediate needs. This was angrily refused (Rec., p. 57). Of course, the effect of such a refusal, as well as the refusal to inventory the crops at a figure that was decidedly favorable to the appellants, would be to enable the firm to retain its *cash* balances indefinitely, and perhaps force the needy employee to a general settlement upon the terms proposed by the firm.

By the time this appeal is finally disposed of about four years will have elapsed since the appellee was refused even the wages admittedly due him.

There is, perhaps, another clue to the unwillingness of the appellants to estimate for cash settlement the value of the growing crops at even $20,000. Since the last previous settlement a new system of bookkeeping was adopted with reference to the exploitation of Santa Barbara and instead of the value of a growing crop going into a general inventory, as was done by the inventory of 1904 (Rec., p. 21), this particular branch of the firm business was to be segregated into a special account in which administration and general expenses were to be figured against the proceeds from the sale of the crops (Rec., p. 30, *et seq.*).

This segregation and this method of accounting appears in the inventory of 1910 and formed the basis upon which it was proposed to settle with the appellee.

Whether the crops were worth as an asset $20,000, to which appellee limited his claim, or $55,000 as found by the experts, the net profits that would be shown after deducting from the proceeds of their sale, administration, general and other expenses was, to say the least, problematical.

The appellants insist that the result did actually show a loss. Both of the lower courts correctly considered such ultimate loss as immaterial in view of the agreement of the parties. Both of the lower courts, however, express their scepticism as to whether the crops really ever were marketed at a lower figure than that estimated by the experts. Said the lower court (Rec., p. 14):

> "As regards the value of the plantations of canes and pines, the defendant introduces in evidence the testimony of Mr. Sewando Pico, general attorney in fact of defendant firm, so as to show that such plantation produced a loss; but it was not determined specifically what said loss consisted of, nor which were the exact amounts thereof, whereas the said defendant had in its possession the books in which the said accounts were necessarily kept, and which is better evidence than testimony in the form given by Mr. Pico."

And the Supreme Court of Porto Rico refers to the matter in the following manner (Rec., p. 77):

> "in case such losses may have really been sustained."

On page 13 of the record the court of first instance, speaking of the inventory of January 15, 1910 (by typographical error printed 1912), in which appears reference to "General Expense Account" and "Administration" account, and there is an entry indicating a new basis of establishing profits, finds this entry was not in the ledgers even so late as March 11, 1910, when the appellee quit, and was inserted *post litem*

motam for effect upon then pending litigation. Nothing, however, could be simpler as a question of bookkeeping than that a loss should appear. The bookkeeping in such cases must, however, if produced in court, be able to pass the scrutiny of the party adversely affected. It is noteworthy that in the case at bar it was not offered for the inspection of the appellee, his counsel or the court. Mr. Pico, a co-employee, testified (Rec., p. 60), that "said account of pines and canes did not yield any profit. I cannot state precisely how much loss there was; they yielded a loss."

This is the only evidence offered by the appellants and is wholly without value for two reasons, first, because it does not appear what was the character or propriety of the charges against the proceeds of sale and, secondly, for another and still more important reason.

It was never contemplated between the parties that separate profit and loss accounts were to be kept of the different subdivisions of the general business, such as dairy account and hide account, shoes account, general merchandise account. The record indicates that all expenses were paid by the firm out of its cash or credit, and undoubtedly there appeared in each inventory, on the passive or liability side, every amount paid out, whether for administration or agricultural expenses connected with Santa Barbara or any other part of the general business, such amounts so paid out appearing, if in no other way, as a diminution in the cash or an increase in the accounts payable. Thus, whatever expenses may have accrued against these crops up to date when their value was estimated, inasmuch as they had been paid by the firm out of its capital, had been paid by the appellee likewise, in the very fact that the profit-earning capital of the firm had been so employed.

It was evidently the appellants' idea to charge them up again against the appellee by having them figure in a profit and loss account of this segregated item of the general business. It is nowhere suggested that these expenses were paid

out of any funds other than those of the firm in the profitable employment of whose capital appellee was interested.

In this view it would seem that the method employed by the experts was more favorable to the appellants than they were entitled to, inasmuch as in estimating the value of the crop as an asset on March 11, 1910, the experts deducted from the estimated market price not merely the expenses which would accrue, and no part of which would be paid by the appellee, but also those which had accrued in their planting and cultivation and which had once already been proportionately borne by the appellee.

The decision of the Supreme Court of Porto Rico should be affirmed.

Respectfully submitted.

A. SARMIENTO,
CHAS. F. CARUSI,
For the Appellee.

In the Supreme Court of the United States

No. 134

PIZA HERMANOS, SEN C., Appellant,

VS.

RICARDO A. GANDIA CALDENTEY, Appellee.

MOTION TO DISMISS AND AFFIRM

CHARLES F. CARUSI,
Counsel for Appellee.

DARLING, PRINTER.

In the Supreme Court of the United States

No. 762

PIZA HERMANOS, SEN C., Appellant,

VS.

RICARDO A. GANDIA CALDENTEY, Appellee.

MOTION TO DISMISS AND AFFIRM

CHARLES F. CARUSI,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

PIZA HERMANOS, SEN C., Appellant,

VS.

RICARDO A. GANDIA CALDENTEY, Appellee.

No. 876.

MOTION TO DISMISS AND AFFIRM.

Comes now the appellee herein, by Charles F. Carusi, his counsel, appearing in that behalf, and moves the Court to dismiss the writ or error in the above-entitled cause and affirm the judgment of the Court below because it is manifest that said writ was taken for delay only and that the questions specified in the assignment of errors are so frivolous as not to need further argument.

Washington, D. C., March first, 1912.

CHARLES F. CARUSI,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

PIZA HERMANOS, SEN C., Appellant,

VS.

RICARDO A. GANDIA CALDENTEY, Appellee.

No. 876.

NOTICE OF SUBMISSION OF MOTION TO DISMISS AND AFFIRM.

To Frederick R. Coudert, Esq.,
32 Rector Street,
N. Y. City,
Counsel for Appellants.

Please take notice that on the first day of April A. D. 1912, at the opening of Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

Dated March first, 1912.

CHARLES F. CARUSI,
Counsel for Appellees.

STATEMENT OF CASE AND ARGUMENT IN SUPPORT OF MOTION TO DIMISS OR AFFIRM.

This is a writ of error from a judgment of the Supreme Court of Porto Rico affirming a judgment rendered by the District Court of San Juan on November 10, 1910, in favor of the appellee for Fifteen Thousand Three Hundred Fifty-eight Dollars and Twenty-three Cents ($15,358.23).

The appellee for about seventeen years was clerk, then correspondent, later bookkeeper, and lastly, attorney in fact for the appellants and for sometime prior to the bringing of this suit was general attorney in fact for the appellants with a monthly salary of One Hundred Forty Dollars ($140) and besides, 10 per cent of the net profits, which was to be credited to his private account. (Finding of Fact III and IV. Record page 86.)

On March 11, 1910, appellee left the employment of the firm and demanded settlement of his salary, including a liquidation of the profits up to the day of his leaving, and specifically stated his claim at Fifteen Thousand Three Hundred Fifty-eight Dollars and Twenty-three Cents ($15,358.23). (Finding of Fact VIII, page 87.) As before stated, the District Court of San Juan and the Supreme Court of Porto Rico both found in favor of the appellee for the precise amount claimed. The defendants have superseded the judgment and will thus secure the use of the appellee's money at a moderate rate of interest for the length of time it will take for this appeal to be reached in its turn for consideration by this honorable

Court. In the meantime the appellee, who was merely an employee of the firm, will have his little capital tied up for a long period.

The errors here assigned by the appellants are practically identical with those raised in the Court below and disposed of by that Court in its opinion. These in many instances, are of the most trivial character, as, for instance, the failure of the Court of First Instance to put the word "net" before the word "profits" (Record 67, page 86).

Another assignment of error related to the refusal of the Court of First Instance to find that the appellee was a partner rather than a clerk of the appellants. The definition of a partnership of the Civil Code of Porto Rico, section 1567, is simply our common law definition, and under the third and fourth findings of fact, which are conclusive upon this Court, there can be no serious question as to the status of the appellee as an employee rather than as a partner.

Another assignment of error was an alleged variance between the allegations of the declaration and proof. This is disposed of by the Court below as follows:

"The allegations and the proof should correspond it is true, however this agreement is not to be literal but substantial and the proof must necessarily be more elaborate than the allegations." (Record, page 69, folio 88.)

The fourth assignment of error presented to the Court below involved an objection on the part of the appellants to the consideration of the increase in value of the Santa Barbara plantation as part of the profits of the firm in which the appellee was entitled to his percentage. The facts showed that the balances in the years 1904, 1905,

1906 all treated the increase in value of the plantation as net profit, with 10 per cent of which the appellee was annually credited on the books of the appellants. The same was done in the years 1907 and 1910, so that the Court's decision was in accordnace with the practice of the appellants themselves and it was not until a dispute arose with this appellee that it is asserted that net increment of the value of real estate cannot be treated as net profit. As the Courts stated:

"In the business of such a firm as that of the appellant's conducting various mercantile establishments, sugar plantations, pineapple farms, dealing in real estate, all sources of profit are properly included in the balance sheet when estimating the net profits derived from the business." (Record, page 70, folio 90.)

Another error assigned was that the appellee was credited proportionately with the profits derived from a part of the appellant's business which was still pending at the date when the suit was begun and could not then have been the subject of liquidation. Appellants relied below upon article 225 of the Commercial Code, which relates to a partner retiring from a firm under those circumstances, but the Court below found that appellee was not a partner and further, that the method complained of was in accordance with precedent established by the appellants themselves (Record 71, page 91).

The sixth assignment of error was substantially the same, the Court holding that the appellee was entitled to his share of the profits on certain crops which had not yet been sold. The appellants claimed that after the appellee had left their employment that these crops had been marketed at a loss. The Court below said (Record 71, folio 91):

"The balance was correctly struck on the 11th of March, 1910, and the value of the crops, on that date, was the sum on which the 10 per cent coming to the respondent was to be collected. Any questions of losses occurring thereafter concerned the appellants alone and the respondent had no participation therein."

The seventh and last assignment of error was a repetition in different terms of the foregoing (Record 72, folio 92).

The Court below, in summing up its opinion, stated the entire controversy substantially as follows:

The appellee claimed that as employee entitled to a fixed salary and 10 per cent of the profits of a miscellaneous mercantile business he was entitled to receive the entire amount due him in cash and that as profits should be considered any increment in value of any of the property purchased and traded in, plantations, crops growing upon the plantations, etc. The evidence of most importance upon these points was that the appellants had themselves, during most of the years of the employment, credited the appellee each year with his fixed salary and with 10 per cent profits estimated on the increase in the value of the various sorts of property traded in, including plantations, stocks of goods, growing crops, etc. (Record, page 72).

The contention of the appellants was that the respondent was a partner and as such under the terms of the Civil Code must await liquidation of the partnership assets or that he should receive his 10 per cent in kind, that is, 10 per cent of the cash, 10 per cent of the merchandise, bills and other property, as was provided in the written articles of partnership between the appellants themselves, but to which the appellee was not a party.

The ten assignments of error, filed for use on this appeal (Rec., p. 83) simply restate from different angles these general contentions of the appellants.

It is respectfully submitted that upon the facts found by way of special verdict by the Supreme Court of Porto Rico and as the same may be more fully understood from the opinion of the District Judge and of the Supreme Court of Porto Rico there is presented by the record in this case no single question of law worthy of serious consideration and the finding of facts by two lower Courts will not lightly be disturbed on appeal.

WHEREFORE, it is respectfully submitted that the writ of error in this case has been frivolously taken and for the purpose of delay and the appllee respectfully requests that in case of refusal to grant the motion to affirm and dismiss that this honorable Court may order the cause transferred to hearing before a summary docket.

Respectfully submitted,

CHARLES F. CARUSI,

Counsel for Appellee.

PIZA HERMANOS *v.* CALDENTEY.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 134. Submitted December 15, 1913.—Decided January 5, 1914.

Where the principle on which the amount recovered is based is admitted, this court will not go behind well warranted findings of fact in regard to the question of amount.

Where it appears that there may have been an error in computing the

amount of the recovery, this court can affirm the judgment without prejudice to reopening the account for the single purpose of correcting such error if the lower court so permits.

THE facts, which involve the construction of a contract of employment, are stated in the opinion.

Mr. Frederic R. Coudert, *Mr. Paul Fuller* and *Mr. Charles B. Samuels* for appellants.

Mr. Charles F. Carusi and *Mr. A. Sarmiento* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the appellee to recover the sum alleged by him to be due upon a correct account between the defendants and himself. The facts as found are that the appellee was employed by the defendants, copartners, at a monthly salary and ten per cent. of the net profits, to be credited in his private account; that after about seven years and a half he left the firm on March 11, 1910; that the points of difference as to accounting concern the valuation of an estate bought by the firm and of some unharvested and unsold crops. The firm credited the estate at cost, $20,584.67, but the courts below found that it was worth $80,000, charged the difference, $59,415.33, as profit, and credited the appellee with $5941.53. They likewise found that the profit on the crops was much greater than the appellee's estimate and therefore allowed him the $2000 claimed in his complaint.

It may be that we should adopt a different rule from that followed by the courts below if the question came here as a pure question of law. But it appears from the opinion of both courts that they found the appellants to have admitted the propriety of charging an increase in

the value of the estate as a profit, so that the question was narrowed to one of amount. The principle being settled in this way it was applied to the unsold crops. We do not go behind these well warranted findings of fact and really there is nothing else before us. The assignment of errors raised some other points, but these were the only matters that were pressed in the final argument or that could have been pressed with any hope of success. It is suggested that if otherwise right the judgment charged the appellants with some items twice over. We do not see it, but if there has been any oversight in this respect our affirmance of the judgment will be without prejudice to reopening the account for the single purpose of correcting errors of calculation if permitted upon application to the Supreme Court.

Judgment affirmed.